

**BROWNFIELDS LEGISLATION: “THE BROWNFIELDS
REVITALIZATION AND ENVIRONMENTAL RES-
Toration Act of 2001,” AND “GILLMOR
DISCUSSION DRAFT,” AND “DEMOCRATIC DIS-
CUSSION DRAFT”**

HEARING
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT AND
HAZARDOUS MATERIALS
OF THE
COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS
FIRST SESSION

JUNE 28, 2001

Serial No. 107–43

Printed for the use of the Committee on Energy and Commerce



Available via the World Wide Web: <http://www.access.gpo.gov/congress/house>

U.S. GOVERNMENT PRINTING OFFICE

73–726CC

WASHINGTON : 2001

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**BROWNFIELDS LEGISLATION: "THE BROWN-
FIELDS REVITALIZATION AND ENVIRON-
MENTAL RESTORATION ACT OF 2001," AND
"GILLMOR DISCUSSION DRAFT," AND
"DEMOCRATIC DISCUSSION DRAFT"**

THURSDAY, JUNE 28, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENVIRONMENT AND
HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. Paul E. Gillmor (chairman) presiding.

Members present: Representatives Gillmor, Greenwood, Largent, Shimkus, Fossella, Ehrlich, Buyer, Bass, Pitts, Terry, Tauzin (ex officio), Pallone, Towns, Brown, Green, McCarthy, Barrett, Luther, Capps, and Dingell (ex officio).

Staff present: Amit Sachdev, majority counsel; Jerry Couri, policy coordinator; Nandan Kenkeremath, majority counsel; Hollyn Kidd, legislative clerk; and Richard Frandsen, minority counsel.

Mr. GILLMOR. The committee will come to order.

First, let me apologize to those who are here for the late start of the committee. We just completed a series of five back-to-back votes, which is the reason we are late. And that, unfortunately, is something over which we have no control.

Today marks the second major hearing this year in this subcommittee on the subject of brownfields. Our first hearing featured, among others, our new EPA Administrator, Christine Whitman, and Governor Minor of Delaware representing the National Governors Association. And I am very pleased to see with us today the outstanding members that we have on today's panels.

Brownfield reform is necessary, both to protect the environment and to protect public safety. Too often today fair law produces an outcome that is very anti-environment.

In our previous hearing, several witnesses testified that fear of liability kept them from cleaning their brownfields. And when people are afraid because of the resulting expense and aggravation involved, they go out and acquire green spaces and virgin farmland for development instead of safely cleaning up and developing a brownfield.

At a minimum, reform is required to stop the unnecessary plowing up of green spaces and farmland so that they can be covered

with asphalt and concrete. I have been a member of this committee for five terms, and throughout that time I have heard members of both parties, of the public, and two administrations talk about reforming Superfund. It has not happened.

This year Chairman Tauzin and I decided to deal with the problem of Superfund in separate parts with separate bills for each part. And so far that effort has been successful. Earlier this year we dealt with small business liability relief, with the introduction of H.R. 1831 by Representative Pallone and myself. That bill passed this committee, and on May 22 passed the House 419 to nothing.

During this session, it is my goal—and I expect that we will see—passage of a brownfields reform bill. The purpose of this hearing is to obtain views from a wide variety of people on nearly all of the possible provisions that have been suggested for brownfields reform. And I am not wedded to any particular provisions at this point.

Before us we have for consideration S. 350. The Senate bill makes a good start, but we have heard from many people on both sides of the aisle, and from outside groups, about improvements that they believe should be made to it, and those views should be considered.

We also have before us two discussion grants. The one that has been called the Gillmor grant is certainly not intended as a final document. It is a discussion draft intended to stimulate discussion and to solicit views.

But I do want to thank those groups who have expressed support for my efforts and for the provisions in the draft, including the National Governors Association, National Conference of State Legislatures, National Association of Counties, the Real Estate Roundtable, National Association of Realtors, United States Chamber of Commerce, National Association of Industrial Office Properties, and the National Association of Home Builders.

Following this hearing, it is my intention to work with my colleagues and with this administration to finalize a bill that will be introduced before this committee, and I expect that process to be completed fairly soon. But I am not going to prejudge the specific provisions which would be in that bill.

However, based on what we have heard so far, some of the principles which I would expect would be contained within the bill would be respecting the ability of States to perform cleanups, removing the fear of investors who are reluctant to invest in brownfields redevelopment, helping innocent landowners, prospective purchasers, and contiguous property owners, cutting back regulatory red tape, and getting the most cleanup money feasible to the most sites for dirt-moving activities.

And, again, I want to thank the witnesses who have joined us today and to let them know how much their testimony means to a House legislative product.

And at this time, I would like to recognize the ranking member of the subcommittee, Mr. Pallone of New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman, for not only holding this hearing today but also for working with us on trying to come

up at some point I think in the future with a bill that we can pass out of the subcommittee on a bipartisan basis.

I do believe, and I have said before, that the time has come for passage of a strong, effective brownfields bill, and I am hoping that we can continue to work together in the future to accomplish this goal on a bipartisan basis. But to achieve this, I believe two things must happen. First, we have to stay very close to S. 350, the bipartisan Senate-passed brownfields bill; and, second, that the bill must maintain a strong, effective Federal safety net.

Many State and local governments, as you know, have discovered the potential brownfields can create for their communities, and over the last couple of years have begun to revitalize these lands.

However, this revitalization does not come without a price tag, nor should it come without what should be a meticulous process to ensure that contamination is vigorously addressed at the site before development takes place. I believe these are areas where the Federal Government can play a role in helping State and local governments tackle these problems.

Currently, Mr. Chairman, the Environmental Protection Agency provides small grants to State and local governments. It is now time, however, to pass a stand-alone brownfields bill that provides the legislative framework and increases funding. This will better serve State and local governments, while at the same time ensuring the health and safety of local residents.

I was pleased to hear during her testimony before the subcommittee a few months ago that the EPA Administrator—I keep calling her Governor—Christine Todd Whitman endorsed a stand-alone brownfields approach. Administrator Whitman also said enacting brownfields legislation this year was an important priority for President Bush.

There are several critical areas that I believe need to be addressed in any successful brownfields legislation. First, it is important that any brownfields legislation include provisions protecting prospective purchasers and developers of brownfields, as well as liability for innocent landowners and contiguous property owners.

I think there is broad agreement that a new purchaser or developer who did not cause the existing contamination should not be liable for cleanup of the property. I believe there needs to be a healthy partnership between the Federal Government and the States in cleaning up these lands.

While some States are dealing with brownfields in a productive and healthy manner, others are not. That is why I believe there are basic criteria that all State programs should meet, such as meaningful public participation, adequate oversight and enforcement resources to ensure that public health and the environment are protected, and a mechanism to provide certification that response action has been completed. These are widely recognized criteria that form the basis of voluntary cleanup agreements, or most agreements, between the EPA and 16 States right now.

With the array of voluntary cleanup programs, we should be very careful in placing restrictions on Federal enforcement authorities. And, therefore, I believe we must maintain a strong and effective Federal safety net.

If a site presents an imminent and substantial danger to human health or the environment after a voluntary cleanup, it is vital that the affected citizens and communities can rely on the Federal Government if State authorities lack the resources or the political desire to address their concerns and protect their health and their neighborhoods. And I was glad to hear Administrator Whitman recognize the importance of an effective Federal safety net.

It is for these reasons that the Democratic discussion draft that I have worked on includes provisions for a strong Federal safety net and establishes general minimum criteria for State response programs. In addition, the Democratic draft has provided for an Advisory Commission to evaluate the concentration and impact of brownfield sites on minority and economically disadvantaged neighborhoods.

It adds clarification of S. 350 to ensure the continued applicability of Davis-Bacon to EPA brownfields grants. It has worker training and safety programs and a reopener that allows the President to bring an enforcement action if the cleanup under a State program no longer protects human health or the environment because of a change in the use of the site.

Mr. Chairman, with all due respect, I have to say that I don't feel that your discussion draft provides the same level of safety for the health of the public and the health of the environment. The chairman's discussion draft changes, in my opinion, the focus of the Senate compromise from lesser contaminated brownfield sites to more seriously contaminated, higher risk, Superfund-type sites.

At the same time, it changes S. 350 to place even more severe restrictions on the EPA's ability to take enforcement action under Superfund at sites where a serious problem remains after a voluntary cleanup.

And, unfortunately, my concerns don't end there. The chairman's discussion draft I think goes beyond the parameters of brownfields by expanding on S. 350 to severely restrict the current citizen's suit authority under Section 7002 of the Solid Waste Disposal Act and the EPA authority under Section 7003, where toxic contamination may pose an imminent and substantial endangerment to human health.

Furthermore, the parties benefited by Title 3 I think are those who do not responsibly—do not act responsibly to perform due diligence, the parties who knew of the contamination at the time they acquired the property and have not yet acted to clean it up, or the parties who were responsible for the contamination in the first place.

In my opinion, the chairman's draft deviates significantly from S. 350, the permit elimination provision, the addition of the Governor's concurrence on the NPL list, the restrictions on public right to know, and the significant changes in Title 3 finality.

So I still think we have a long way to go in negotiations. But let me say I believe it is important for Congress to strike a balance between the desire to provide redevelopment incentives that will work for the broad variety of sites, while at the same time maintaining the assurance to affected citizens that these sites will no longer threaten the health of the community environment.

And I think we can find agreement on the main principles. And I also know, having worked with Chairman Gillmor for the last few months, that he is always willing to work together to find a compromise. So even though I have significant differences I think between the chairman's draft and the Democratic draft, I still think we can work this out, mainly because I know that it is easy to work with Mr. Gillmor. He is very cooperative.

Thank you.

[The prepared statement of Hon. Frank Pallone follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW JERSEY

Thank you, Mr. Chairman, for holding this important hearing today. I believe that the time has come for passage of a strong, effective brownfields bill. I'm hoping that we may continue to work together in the future to accomplish this goal on a bipartisan basis. But to achieve this, I believe two things must happen:

1. We must stay very close to S.350, the bipartisan Senate-passed brownfields bill; and
2. That bill must maintain a strong, effective federal safety net.

We all know that Brownfield sites are parcels of land that contain abandoned or under-used commercial or industrial facilities where contamination has been found. What distinguishes a brownfield from a Superfund site, is that brownfield sites do not contain nearly as much contamination as Superfund sites. Over time, this distinction has kept many communities from dealing with brownfields, since these sites do not always pose obvious threats to public health.

It's time for all of us, at the federal, state and local levels, to change our thinking on brownfields. Rather than ignoring these sites, it is time for us to envision the possibilities these lands create for our communities. Not only can these sites spark economic development with the opening of a new business on land that is cleansed of its contamination, but they also create a perfect opportunity to create more open, green space for recreation. Revitalizing these areas can improve a neighborhood by creating new jobs and cutting down on crime. Why should these sites lay barren, as an eyesore in the future?

Many state and local governments have discovered the potential brownfields can create for their communities and over the last couple of years have begun to revitalize these lands. However, this revitalization does not come without a price tag, nor should it come without what should be a meticulous process to ensure that contamination is vigorously addressed at the site before development takes place. I believe these are areas where the federal government can play a role in helping state and local governments tackle these problems.

Currently, the Environmental Protection Agency (EPA) provides small grants to state and local governments. It is now time, however, to pass a stand-alone brownfields bill, that provides a legislative framework and increases funding. This will better serve state and local governments, while, at the same time ensuring the health and safety of local residents.

I was pleased to hear during her testimony before this Subcommittee, that EPA Administrator Christine Todd Whitman endorsed a stand-alone brownfields approach. Administrator Whitman also said enacting brownfields legislation this year was an important priority for President Bush.

There are several critical areas that I believe need to be addressed in any successful brownfields legislation:

First, it is important that any brownfields legislation include provisions protecting prospective purchasers and developers of brownfields, as well as liability for innocent landowners and contiguous property owners. There's broad agreement, that a new purchaser or developer who did not cause the existing contamination should not be liable for cleanup of the property.

I believe that there needs to be a healthy partnership between the federal government and the states in cleaning up these lands. While some states are dealing with brownfields in a productive and healthy manner, others are not. That is why I believe there are basic criteria that all state programs should meet, such as meaningful public participation, adequate oversight and enforcement resources to ensure that public health and the environment are protected, and a mechanism to provide certification that response action has been completed. These are widely recognized criteria that form the basis of voluntary cleanup agreements between the EPA and 16 states.

The General Accounting Office (GAO) has reported that state voluntary programs vary dramatically. About half the state programs GAO surveyed in 1997 had not made any provision for either monitoring nonpermanent cleanups or for overseeing their accomplishment.

State plans also deal with cleanups in many different ways. In Illinois, for example, a new developer may decide to cleanup just one of several chemicals at a site and receive a certification for that chemical alone. In my home State of New Jersey, the liable party responsible for creating the contamination is not eligible for any liability protection under the brownfields program. In other states, the person or company who polluted the site is eligible for liability protection.

With the wide array of voluntary cleanup programs, we should be very careful in placing restrictions on federal enforcement authorities and, therefore, we must maintain a strong and effective federal safety net. If a site presents an imminent and substantial danger to human health or the environment after a voluntary cleanup, it is vital that the affected citizens and communities can rely on the federal government if state authorities lack the resources or the political desire to address their concerns and protect their health and their neighborhoods. I was glad to hear Administrator Whitman recognize the importance of an effective federal safety net.

It is for those reasons, that the Democratic Discussion Draft that I have worked on includes provisions for a strong federal safety net and establishes general minimum criteria for state response programs. In addition, the Democratic Draft has provided for: an advisory commission to evaluate the concentration and impact of brownfields sites on minority and economically disadvantaged neighborhoods; clarification of S.350 to insure the continued applicability of Davis-Bacon to EPA brownfield grants; a worker training and safety program; and a re-opener that allows the President to bring an enforcement action if the cleanup under a State program no longer protects human health or the environment because of a change in the use of the site.

I do not feel that the Gillmor Discussion Draft provides the same level of safety for the health of the public and the health of the environment. The chairman's discussion draft changes the focus of the Senate compromise from lesser contaminated brownfields sites to more seriously contaminated, higher-risk Superfund-type sites. At the same time, it changes S. 350 to place even more severe restriction on the EPA's ability to take enforcement action under Superfund at sites where a serious problem remains after a voluntary cleanup. Unfortunately, my concerns do not end there.

The Gillmor Discussion Draft goes beyond the parameters of brownfields by expanding on S.350 to severely restrict the current citizen suit authority under Section 7002 of the Solid Waste Disposal Act and EPA authority under Section 7003 where toxic contamination may pose an imminent and substantial endangerment to human health. Furthermore, the parties benefited by Title III are those who did not act responsibly to perform due diligence; the parties who knew of the contamination at the time they acquired the property and have not yet acted to clean it up, or the parties who were responsible for the contamination in the first place.

In my opinion, the Gillmor draft deviates greatly from S.350. Before we can begin to hammer out a bipartisan agreement, I need to make it clear that I, and I believe many others have grave problems with the Gillmor proposal. From the peanut elimination provision...to the addition of Governor's Concurrence on NPL listing...to the restrictions on public right to know and the significant changes in Title III (finality)...it is clear that we have a long way to go in negotiations.

However, I believe it is important for Congress to strike a balance between the desire to provide redevelopment incentives that will work for the broad variety of sites, while at the same time maintaining the assurance to affected citizens that these sites will no longer threaten the health of the community or the environment. I hope that we may find agreement on these main principles and that we may move forward in the future on bipartisan brownfields legislation that will play an important role in cleaning up these sites.

Mr. GILLMOR. Thank you.

The gentleman from Pennsylvania, Mr. Greenwood. Oh, he just stepped out?

On this side, the next member is Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I had a chance within the last couple of weeks to visit a location that is just outside my district and Congressman Costello's in Alton, Illinois—Clark Properties. And they have actually redeveloped

oped a brownfield, the old LaClede steel plant. And they are just doing a tremendous job.

They specialize in this. They had to do a lot of bonding of insurance packaging to do that. One thing they have continued to reinforce to me is the importance of legal certainty, and that is going to be a big issue of our debate. That is why I am concerned with the additional reopeners that are in the Democratic draft discussion.

People will not invest capital if there is uncertainty of the risks that they obtain. It is pretty simple. Alton, Illinois, which is an old industrial city on the river, the people there are just seeing a beautiful example of what can happen. So I think we need to be very, very careful as we approach this to make sure that we eventually come to an aspect where we finally say it is okay if you invest here. There is hold harmless. Especially if it is new money going into a new area, legal certainty is the key.

And hopefully we will move in that direction, and I think there is some good give and take on both sides. But if we dilute the legal certainty debate, the brownfields argument that has been here longer than I think I have been alive will continue to go unresolved, because legal certainty is at the key of redeveloping these sites.

I look forward to the hearing, and I yield back my time.

Mr. GILLMOR. The gentleman yields back.

The distinguished ranking member of the full committee, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, thank you for your courtesy. Mr. Chairman, I welcome this hearing today, and my colleagues on the Democratic side are here to offer you our assistance in achieving a good bipartisan bill. We hope this offer will be accepted.

Members on this side of the aisle have put forward and strongly supported stand-alone brownfield legislation in the past two Congresses, and we do so again this year. We do so in the Democratic discussion draft.

I note, Mr. Chairman, that S. 350 is not an illusion but a reality. The Senate has passed a stand-alone brownfield bill by a vote of 99 to nothing. That bill has the support of EPA Administrator Whitman and President Bush. The Senate bill is a remarkable bipartisan political compromise. It spans the entire ideological and political spectrum.

The Democratic discussion draft respects the delicate compromises and fundamental policies reflected in S. 350. We hope we can work with our Republican colleagues on these matters.

The Democratic proposal remains tightly focused on Superfund. It does not seek to amend other statutes like the Solid Waste Disposal Act. The Senate Committee on Environment and Public Works, under Republican control at the time, explicitly rejected amendments affecting the Solid Waste Disposal Act and a number of other statutes.

Further, in our draft, we do not give the EPA Administrator the regulatory authority to amend a number of statutes, such as the Clean Air Act, to eliminate the need to obtain permits where so required.

Finally, our discussion draft does not go into the broader Superfund reform issues, heeding the advice of Administrator Whitman and recognizing that such action could again, as it has in the past, stall all progress in these matters.

Unfortunately, the discussion draft put forward by our colleagues on the Republican side departs dramatically from the scope and policies of S. 350. Under that draft, the focus of S. 350 is changed from lesser contaminated sites to higher risk, seriously contaminated sites—something we believe is unwise. The Senate compromise on finality and the Federal safety net is disregarded. This is, I believe, unwise and extreme.

Mr. Chairman, we believe we should listen to the Nation's Mayors. These are the people who are in the frontlines of brownfields redevelopment and they have the most at stake in these matters. They have concluded that S. 350 meets their fundamental needs.

In our deliberations, I believe we must stay close to S. 350 and avoid rolling back policies of the current, successful EPA brownfields program.

Finally, I am very much saddened by the lack of bipartisan cooperation from the EPA and the Bush Administration in providing information on these issues to Democratic members of this committee.

Eighty-four days ago, almost 3 months, Mr. Pallone and I sent Administrator Whitman a letter containing five questions pertinent to the precise subject of this hearing on brownfields. I would ask unanimous consent that our letter be inserted in the record at this point. Perhaps it will inspire the Administrator to give us an answer which is badly needed.

I would note that as of this morning no answer, no information, not even an acknowledgement has been received. One must inquire whether it would benefit the Administrator to borrow the White House's form letter and at least an automatic signature pen, so that they may respond to inquiries from members on this side.

Clearly, this is unacceptable behavior by a Federal agency and its senior officials who are charged with administering Federal laws within the jurisdiction of this committee. I would note that if we are to achieve a bipartisan result we should get responses to our inquiries, particularly since they are directed in a helpful fashion.

I believe that this behavior is a disservice to the legislative process and to the constituents that we serve. I look forward to the testimony of our witnesses.

And, Mr. Chairman, I hope that we will be able to go forward with a bipartisan proposal which will recognize the realities of the situation, and avoid things which have precluded us from achieving any success in this matter for the past two Congresses.

Thank you.

Mr. GILLMOR. Thank you, Mr. Dingell.

The gentleman from Oklahoma, Mr. Largent.

Mr. LARGENT. Thank you, Mr. Chairman. I would just say I found the ranking member's opening statement most enlightening. It is the first time I have heard him be willing to kowtow to the Senate's leadership on the brownfields issue and say that we

should rubber stamp the work in the Senate and not try to improve it in the House.

But, Mr. Chairman, I am looking forward to working with you on this committee and the full committee in the House to get this important legislation passed. It is important for the district that I represent. In fact, I believe all districts—most districts are affected by the brownfields issue, and this is a very important issue.

And I would also concur with my colleague from Illinois to say that having the issue of finality addressed in these brownfield issues is absolutely critical to see the investment that we need to make in so many brownfields around the country.

So, Mr. Chairman, with that I will yield back my time.

Mr. GILLMOR. The gentleman yields back.

The gentleman, Mr. Luther.

Mr. LUTHER. Thank you, Mr. Chairman. I will be very brief.

I think we are fortunate to have a piece of legislation that has been passed by the Senate. The fact that we have S. 350 passed on a bipartisan vote, 99 to zero—I don't know how you can get more bipartisan than that—means that we have an excellent product before us.

And it strikes an important balance between encouraging State flexibility but preserving the Federal safety net, the balance between providing liability relief to innocent landowners and parties, but holding negligent participants accountable. And I think it is very wise that Mr. Pallone, Mr. Dingell, and other members of the committee have used that as a blueprint now for the bill that is before us.

And basically, Mr. Chairman, I think that means that we have a terrific opportunity—an opportunity to not allow 1 more year of inaction on an important issue such as this. We have an opportunity this year to pass bipartisan legislation, move forward and not have another—some more time that is passing without having important legislation in this area.

And so I thank you for the time, look forward to the testimony, but above all, Mr. Chairman, hope that we can move expeditiously forward and get the job done.

Mr. GILLMOR. The gentleman from Nebraska.

Mr. TERRY. Thank you, Mr. Chairman. I appreciate your holding these hearings and appreciate the draft proposals that have been submitted. I look forward to the discussion from our witnesses today, particularly on the issues of finality and reopeners.

I believe that S. 350 is weak, and we should improve it, particularly in those areas. I have mentioned at this committee before, Mr. Chairman, that I spent 8 years on the Omaha City Council. And probably the most contentious issue during that time wasn't new trash contractors or major road construction projects, but when the city felt it was so important to redevelop the industrial riverfront property and could find no subsequent purchasers willing to accept the risk of accepting title to property even after a cleanup.

So the city decided it would become the subsequent purchaser of those properties. We would receive title to those properties. It put us in a position of relying on all of the expert witnesses that we hired, engineers, on whether the cleanup was appropriate. It was run under the State Department of Environmental Quality.

We asked the EPA for a letter reviewing that. We had a letter—I know it was unique—but had a letter from the EPA saying, “The cleanup looks fine to us.” What we found out is we could not rely on that letter at all. We could not rely in any way feeling confident that we could avoid subsequent litigation in the future.

Now we have agreements with the first—the polluter, Sarco. But, nonetheless, it became the focus of the discussion of whether or not to rehabilitate this abandoned industrial property in the heart of our downtown. If we don’t address the issues of finality and limit the reopeners we really aren’t going far enough to incent the brownfields cleanup that is the purpose of this legislation.

So I look forward to hearing from the witnesses. I look forward to a good discussion on those issues, Mr. Chairman. And whatever time I have left I yield back.

Mr. GILLMOR. The gentleman yields back.

The Chair would request unanimous consent that all members be able to submit their statements in writing, those who wish to. Is there any objection? The Chair hearing none, members may submit them.

The gentlelady from California.

Ms. CAPPS. Thank you, Mr. Chairman, for holding this important hearing today.

The redevelopment of brownfields is a critical issue, not only for our big cities but our smaller cities and towns across this Nation. Encouraging this redevelopment means reducing the threat of urban sprawl and strains on our transportation systems. It means taking advantage of the infrastructure already in place in many urban or older industrial areas, and it means creating jobs and economic opportunity for neighborhoods often neglected.

I know this because I have seen it work in my district in California. The redevelopment of a brownfield in Goleta is a good example. Here is an example of a small and growing community recapturing valuable property and improving the local economy and quality of life. We need to encourage more of this kind of revitalization of our communities.

And as I said in our brownfields hearing back in March, over the past few years a bipartisan consensus on brownfields legislation has emerged—the most recent evidence being the Senate action on S. 350 with 69 co-sponsors and a vote of 99 to zero, and the administration’s support.

I am very supportive of the discussion draft that many of us on our side of the aisle have put together on brownfields. This measure closely tracks S. 350. Our draft both encourages the redevelopment of brownfields and continues to ensure that the public health is always safeguarded.

The liability protections for prospective purchasers of brownfields, innocent landowners, and contiguous property owners contained in S. 350 and in our draft are particularly important. They offer much-needed assurances to developers and property owners who are trying to do the right thing by revitalizing brownfields.

Clearly, we want to ensure finality for those involved in cleanup, but we also want some finality in the reduction of threats to public

health and safety, which are opposed by brownfields, and only effective cleanup will do that.

I have yet to examine the majority's draft closely, but I am concerned that it appears to change the focus of the bill from lesser contaminated sites to much more seriously contaminated sites. It also restricts EPA and citizen action to protect the health and safety of our community, and I believe these changes veer away from the carefully crafted compromise in S. 350. And I don't think that is where we want to go with this legislation.

I hope we can build on the progress made earlier this year on liability relief for businesses that have contributed minimal amounts to Superfund sites. In that effort, a carefully negotiated and crafted compromise was arrived at through painstaking discussions that will benefit businesses and our constituents.

Quite frankly, I think S. 350 provides us with a similar opportunity for common sense legislation, and we should waste no time in seizing it.

Thank you, and I yield back the balance of my time.

Mr. GILLMOR. The gentlelady yields back.

The gentleman from Pennsylvania. Mr. Pitts, did—

Mr. PITTS. Thank you, Mr. Chairman. I will submit my opening statement for the record. Thank you for holding this hearing, and I am looking forward to working with you and hearing the distinguished panel.

Mr. GILLMOR. Thank you very much.

The gentlelady from Missouri.

Ms. MCCARTHY. Thank you, Mr. Chairman, and I thank you for having this hearing today. I am particularly pleased that on panel two we will have a representative from the National Conference of State Legislatures addressing us, because this is truly a Federal, State, and local effort.

And having served 18 years in the Missouri General Assembly, I am very concerned about striking the proper balance between Federal oversight and State and local flexibility and control regarding the brownfields initiative. Our actions at the Federal level should complement the successes of the local brownfields programs while also providing the EPA with the necessary authority to ensure that sites are satisfactorily cleaned up.

I would like to take a moment to highlight some of the successes that have occurred in my community, because in 1998 the Kansas City Region was designated as one of only 16 awarded a showcase community by the Environmental Protection Agency. In this posture, the program earned the EPA Region 7's Phoenix Award, a national honor recognizing excellence in brownfields development work.

Some results in my district, for example, with the Lewis and Clark redevelopment area located in historic West Bottoms and known for years in Kansas City as the stockyard was indeed impressive. This area was ravaged by a devastating fire in 1998, leaving businesses and abandoned buildings gutted.

And normally a rebuilding process would begin except if there is contamination that complicates the process, as we know. In this instance, there were mitigating factors associated with contamination.

But the Federal brownfields program provided the trained technical staff to help eliminate the contamination and allow this program to go forward in an expedited way. And I am concerned that the discussion draft before us will restrict that in the future.

But in all parts of my district there are similar success stories, whether it is to historic 18th and Vine, jazz entertainment district, the Beacon Hill neighborhood housing redevelopment, or the Blue River industrial corridor. The results are real with business and job growth improvements and quality of life and reinvestment in our communities in what would otherwise be a depressed area.

Mr. Chairman, in March this subcommittee held a hearing on removing barriers to brownfield cleanups. And I spoke of my interest in seeing that brownfields funding for petroleum and lead-based paint asbestos sites be considered and addressed in any brownfields legislation.

A bill is needed to move beyond CERCLA limits that prevent assistance for worthy brownfields projects which involve these contaminants. At that hearing, EPA Administrator Whitman testified and assured me that she wanted to work with Congress to ensure that any legislative language drafted is flexible enough to provide for cleanup of these type of sites.

I do not see that in the draft before us, but I am very pleased that S. 350 and the Democratic discussion draft include provisions to fund the cleanup of petroleum contaminated sites. These two bills authorize \$50 million to be made available for these type of sites, or, if the amount is less than \$200 million, 25 percent of the amount made available should be used for site characterization, assessment, and remediation.

Mr. Chairman, I would not want to do anything to reduce funding that is provided in S. 350 and the Democratic draft. I think it—rather than create a ceiling, as the chairman's draft does, I think we should talk about a floor for funding that allows for no more than 25 percent of the amount made available be used for site characterization, assessment, and remediation.

I am concerned because exclusion and limitation of CERCLA and most of the EPA assessments and remediation loan funding tools of brownfields need to be used for these petroleum contaminated sites but cannot in the draft before us.

So for an urban area such as mine, these are real sites, and people are interested in cleaning them up and redeveloping them. We need to be helping in that regard, because in my district where there is a serious urban core they were once former gas stations and tire stores and auto salvage shops. Closed and now vacant, these sites have a strategic location and the potential for future commerce.

Mr. Chairman, I thank you for this hearing today and will submit the entirety of my remarks for the record.

[The prepared statement of Hon. Karen McCarthy follows:]

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

I would like to thank you Mr. Chairman and the Ranking Member for holding this hearing today. I welcome the opportunity to have a dialogue on the key Brownfields legislative proposals before us and look forward to hearing the testimony of our distinguished witnesses. I am particularly pleased that on the second

panel we have Delegate Leon Billings addressing us on behalf of the National Conference of State Legislators (NCSL), because this is truly a federal, state and local effort. As a longstanding advocate of the Brownfields program, I am pleased that this Committee is moving forward to examine how best to improve this most successful initiative.

The Democratic discussion draft that we have before us recognizes the delicate balance of S. 350. However, Mr. Chairman, I am concerned that the "Gillmor Discussion Draft" changes the focus of S. 350 may result in no Brownfields reform legislation will come to pass.

Having served 18 years in the Missouri General Assembly, I am very concerned about striking the proper balance between federal oversight and state and local flexibility and control regarding Brownfields. Our actions at the Federal level should compliment the successes of the local Brownfields programs, while also providing the EPA with the necessary authority to ensure that sites are satisfactorily cleaned up. I would like to take a moment to highlight some of the successes that have occurred in my community.

In 1998 the Kansas City Region was designated as one of only 16 awarded as a "Showcase Community" by the Environmental Protection Agency (EPA). This past year the program earned the EPA Region 7's Phoenix Award, a national honor recognizing excellence in Brownfield redevelopment work. Results in my district include the Lewis and Clark Redevelopment Area located in the historic West Bottoms, known for years in Kansas City's growth as the "stock yards." This area was ravaged by a devastating fire in 1998, leaving business and abandoned buildings gutted. Normally a rebuilding process would begin except when there is a contamination complicating the process. In this instance, there were mitigating factors associated with contamination and the federal Brownfields program was used to partner with the city and economic development agencies to eliminate the contamination. With the involvement of the Brownfields program, a blighted eyesore on the threshold of downtown Kansas City has been removed and rejuvenated to restore and create jobs and economic development. A success story through the partnership of Brownfields and Superfund.

In all parts of my district there are similar success stories whether it is the Historic 18th and Vine Jazz Entertainment District, the Beacon Hill Neighborhood housing redevelopment, or the Blue River Industrial Corridor.

The results are real with business and job growth, improvement of quality of life, and reinvestment in our communities in what would otherwise continue to be a depressed area.

In March, this Subcommittee held a hearing on removing barriers to Brownfields cleanups and I spoke of my interest in seeing that Brownfields funding for petroleum and lead-based paint and asbestos sites be considered and addressed in any Brownfields legislation. A bill is needed to move beyond CERCLA limits that prevent assistance for worthy brownfields projects which involve these contaminants. EPA Administrator Whitman testified that day, and she assured me that she wanted to work with Congress to ensure that any legislative language drafted is flexible enough to provide for cleanup these types of sites.

I am very pleased that S. 350 and the Democratic discussion draft includes provisions to fund the cleanup of petroleum-contaminated sites. Both bills authorize \$50 million to be made available these types of sites, or if the amount is less than \$200 million, 25% of the amount made available shall be used for site characterization, assessment, and remediation. However, I am concerned with the Chairman's proposal which drastically cuts the necessary funding that is provided in S. 350 and the Democratic draft to do the necessary cleanup of these sites. The Chairman's draft creates a ceiling, rather than a floor, for funding by allowing for *no more* than 25% of the amount made available be used for site characterization, assessment, and remediation. In addition, the proposal completely strikes the \$50 million in funds authorized for these types of activities.

This concerns me because due to exclusion and limitations of CERCLA, most of the EPA assessments and remediation loan funding tools for brownfields cannot be used on these petroleum-contaminated sites. In urban areas such as mine, these are real sites that people are interested in cleaning up and redeveloping, the "heart and soul" of any brownfields legislation. There are low risk sites in my urban core that were once former gas stations, tire stores and auto salvage shops, that have closed and are now vacant. These sites have a strategic location and the potential for future commerce.

There are additional measures in the Chairman's Discussion draft that I have concern with, including changing the definition of brownfields sites from applying to lesser contaminated sites to seriously contaminated, high-risk Superfund-type sites and removing brownfields training and technical assistance programs. Mr.

Chairman, the redevelopment of brownfield sites is important for the health and economies of the communities across the nation and I hope that we can work in a bipartisan spirit to overcome our differences to reach a compromise that we can all agree on. Thank you Mr. Chairman, I yield back my time.

Mr. GILLMOR. Thank you.

The gentleman from Maryland.

Mr. EHRLICH. Mr. Chairman, thank you for having this hearing.

I guess folks in the room can understand, just from what they have heard already, that there is a deep and wide philosophical divide with regard to what this bill should look like. And I think that is good, that is why we get paid.

I do not have a prepared statement, Mr. Chairman. Clearly, we all know why we are here. A strong brownfields bill, a substantive bill, is long overdue.

Maybe the most abused term in American politics today is compromise, second only to bipartisanship. And I have seen in my home State what a watered-down compromise brownfield statute does, which is basically nothing. And that is clearly unfortunate.

I understand that it is not to denigrate either side of this debate or the executive branch, because people love press conferences and bills and numbers and titles. However, I would hope that once we have this hearing and we fully understand the philosophical divide even in clearer terms, we have to really get down to true compromise.

If possible, because I—as one legislator from Maryland who has seen this area develop over the years, I would rather have no bill than a bad bill, because a bad bill raises false expectations. We have lived with that far too long with regard to this area.

I represent a district outside of Baltimore, and ask any member of this committee, as a committee Member of Congress who represents either an urban area or the suburbs outside of an urban area, and they will identify tens, dozens, hundreds of brownfield sites that need to be cleaned up and are not cleaned up, and I would suspect would never be cleaned up under the Senate bill or the Democrat version that we see from our House members so far.

Mr. Terry talked about the importance of finality. It stands to reason, and we also clearly marry that with respect to liability, we are talking about incentives with respect to bona fide purchasers, innocent landowners, and the whole category of people we should protect with regard to liability. And if we can't, this statute will mean nothing. Nothing.

Mr. Chairman, this is a very important hearing. Clearly, any bill that is not incentive-based will not work. Clearly, the platitudes that you are going to hear and have heard probably on both sides of the aisle do not move this discussion forward.

And I hope in the end, at the end of the day, at the end of the weeks and the months, that we see in our immediate future we can get down to a bill that means something in the real world for poor people who live in urban areas, who live in these neighborhoods, who always live in these neighborhoods, and who are forced to live in the midst of brownfield sites that should be cleaned up and are not, because we cannot as a Congress of the United States come up with a legitimate bill to provide real relief in the real world for real people.

I yield back my time.

Mr. GILLMOR. The gentleman yields back.

The gentleman from Texas.

Mr. GREEN. Thank you, Mr. Chairman.

It is interesting where we come down on the brownfields issue. This is my third term on the committee, and it has been frustrating because we haven't had a brownfields legislation, and maybe no bill is better than a bad one, but we have experienced that from my three terms.

And I would hope to see something come out that would be a bipartisan effort in the opportunity today to look at the three bills. And maybe we don't need to have 99 to zero as the Senate did, but I would hope to have a very bipartisan bill as it comes out.

Brownfields pose a roadblock to the redevelopment. It is not polluted enough for a Superfund site, and yet many developers will—don't want to take that liability on the cleanup costs. I do, coming from area in—a very urban area in Houston have some success, like other colleagues, with cooperation between State and city and the Federal Government and also the private sector on redevelopment of brownfields.

The city of Houston has literally a showcase of 550 acres of brownfield site that was redeveloped. It is now creating 2,400 jobs and returning \$2 million in taxes to the city, the county, and the school districts.

The program helped to reduce eyesores in our communities just east of downtown, and improved neighborhood quality of life, and spurred different development types, and that is including not only our new baseball stadium but new performing arts center and almost 1,000 units of new housing.

In my own district, just to the east of where the new stadium is at, we have some success with the redevelopment of what was Hughes Tool Company, Central City Industrial Park, located just east of downtown in Hispanic east end. It is a former heavy industrial site that now has a State office building and created over 5,800 new jobs. The current occupancy rate on that facility is 96 percent.

Again, it is an example of what can be done with State, with government and private sector cooperation, and we couldn't have done it without Baker Hughes Industries, who did that.

Another site we have is the Latino Learning Center. It was a former staging area for a trucking company, and no one wanted to do anything with that property. For 17 years it was vacant. It became a neighborhood dump. And now, because of the effort of both the city and community development dollars, we have a 64-unit senior citizen housing complex, health center, and a 5,500 square foot community center.

So there are redevelopment of brownfields that are happening. We just need to make sure it can happen more, and that is why we need to pass Federal legislation to move that process along. I hope our committee will work on a bipartisan basis on a consensus on a bill, and hopefully help many more success stories from all of our districts to happen.

I yield back my time.

Mr. GILLMOR. The gentleman from New York, do you have an opening statement? The gentleman from New Hampshire?

Mr. BASS. It is in the record, Mr. Chairman.

Mr. GILLMOR. Thank you very much.

And the gentleman from Indiana has departed. That concludes, to the best knowledge of the Chair, all of the opening statements, and we will then proceed to the questions.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. VITO FOSSELLA, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

I'd like to thank Chairman Gillmor for holding this hearing on this important and timely legislation. Federal Brownfields legislation is much needed, and I feel, will go a long way to expediting and improving site assessments and cleanups.

Brownfields are generally accepted to be abandoned or underutilized former industrial properties in which potential or real environmental contamination hinders or prevents redevelopment and reuse. Being considered a brownfield site is often a double edged sword—they are usually not eligible for Superfund remediation funding under the Superfund program because they pose a low public health risk while, at the same time, developers may avoid them because of cleanup costs, potential future liability, or related reasons, thereby stalling economic redevelopment.

I support the Gillmor Discussion Draft and feel that this legislation will go a long way to protect our environment and public health, will reduce litigation and will enable small businesses to develop Brownfields sites by providing liability protection for a number of non polluters. Under this draft, contiguous property owners, innocent landowners and prospective purchasers are exempted from liability. In addition, liability relief is provided for small businesses, municipalities, recyclers, service station and response action contractors. This Draft goes further than S.350 by extending prospective purchaser relief to cover petroleum contamination, RCRA sites and underground storage tanks.

This draft establishes a Brownfield Assessment Grant Program, by which a state or local government may receive assistance for developing an inventory and collecting an assessment of one or more eligible Brownfield sites. Also established is a Brownfield Remediation Program through which a state or local government may receive money to establish a revolving loan fund. These are all positive steps forward to improving the environment, reducing litigation, and fostering economic redevelopment.

Over the past several years, one issue of particular concern throughout this debate has been liability. It makes no sense to saddle new owners with liability for pollution they did not cause or create. In my district, there are numerous actual and potential Brownfield sites scattered across areas such as Richmond Terrace and Port Richmond. While it has much property available to potentially develop, business owners are leery to purchase these properties for fear of being held liable for cleanup and damages. Banks and insurance companies are skeptical of putting any financial backing behind potential investors. A GAO report from December of 2000, entitled *Brownfields* affirmed this theory:

"The potential for being held liable under CERCLA for the contamination on brownfield properties is a significant barrier to redevelopment, according to lenders; property purchasers, such as developers; and property owners. Most brownfields are not likely to be added to the list of potential NPL sites because they are not severely contaminated. However, investors are still wary of the cleanup liability provisions of both federal and state legislation because these can apply even at non-NPL sites. As a result, lenders and developers may avoid investing in potentially contaminated properties, and current owners may avoid selling them."

*United States General Accounting Office Report to Congressional Requesters,
GAO-01-52, Brownfields—Information on the Programs of
EPA and Selected States, December 2000, Page 34.*

In addition, I believe the States should be primarily responsible for overseeing the redevelopment of Brownfield sites and that if a State does indeed have a qualified state program, those sites should be free of the risk of being examined by the EPA. As it stands now, businesses, municipalities and potential landowners are fearful of the EPA second guessing the judgements of states and having to face potentially insurmountable problems down the road. The Gillmor Draft addresses this issue by

limiting federal reopeners for state brownfields cleanups and increases the finality of these cleanups.

Fortunately, New York, under the leadership of Governor Pataki, already has programs, procedures and policies in place for the remediation of Brownfields, including a Voluntary Cleanup Program. Our great state has made vast strides in assessing and remediating contaminated sites, with over 125 cleanup projects approved, almost 200 ongoing or completed investigations and over 50 completed cleanups. New York has become one of the leading states in this environmental arena. New York itself set aside \$200 million in the 1996 Clean Water/Clean Air Bond Act for assessment and cleanup of these sites—one of the biggest financial commitments in the country. But there is much work left to be done.

I strongly believe that we must all work together to foster the redevelopment of Brownfields sites and help small businesses and others utilize these properties—making them once again viable community areas as well as economically productive sites. Businesses, the financial industry, government and environmentalists have an excellent opportunity to work together to give these properties new leases on life. We all need to strike a balance that guarantees that these sites are cleaned up thoroughly, safeguards our environment and yet also provides businesses with protection to take them over.

I thank the Chairman and give back the balance of my time.

Mr. GILLMOR. I, first of all, want to thank—I want to thank you for coming today. Congratulations on your confirmation, and the floor is yours.

**STATEMENT OF HON. LINDA FISHER, DEPUTY
ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY**

Ms. FISHER. Thank you, Mr. Chairman. If it is all right with you, I will summarize my comments and have my full statement inserted in the record.

It is a pleasure to be here today to have the opportunity to appear before this committee in my new role as Deputy Administrator. I look forward to working with the members of the Energy and Commerce Committee on brownfields and on the many other issues on the environment in the future.

I am pleased to see that Chairman Gillmor and Congressman Pallone have developed legislative discussion drafts that seek to promote the cleanup and development of brownfield properties. As Governor Whitman has stated, enacting brownfields legislation this year is an important legislative priority for the Bush Administration, and we are committed to working with Congress to achieve that goal.

As the committee continues its deliberation and moves forward with the brownfields bill, EPA would like to work with you on legislative refinements.

Mr. Chairman, I believe that EPA and the members of this committee—in fact, the vast majority of the members of the House and Senate—all share the same goal, and that is to encourage cleanup and development of brownfields properties throughout this Nation. While many of us share the same goals, there are genuine differences of opinion as to how to get there. But I believe that none of these differences that we have are insurmountable.

We are pleased to see that Chairman Gillmor's discussion draft authorizes a grant and loan program to provide the States and local communities the resources to identify, assess, and clean up brownfield properties while providing more flexibility to implement these programs.

We are also pleased to see that the discussion draft clarifies Superfund liability for contiguous property owners and, perhaps

more importantly, prospective purchasers and innocent landowners.

Further, Chairman Gillmor's discussion draft provides resources to States to continue cleanup program developments and seeks to strike a balance between the need for liability and enforcement certainty to encourage brownfield cleanups and development, with the need for a strong, Federal safety net to ensure that EPA has the necessary authority to protect human health and the environment.

Finding the appropriate balance between enforcement and liability certainty and maintaining a protective Federal safety net will go a long way in achieving our shared goal of enacting brownfields legislation this year.

Thank you for the opportunity to appear before you today to discuss this legislation.

I also want to take the opportunity to apologize to Mr. Pallone and Mr. Dingell for not getting our letter back to him. If I hadn't been in the hearing today I wouldn't know that it was still in the agency. So we will do whatever we can to get it up to you as quickly as we can. It is not our intention to have you wait for almost 3 months to get a letter in return from us.

So I do look forward to working with all of you on the subcommittee, and I would be happy to take your questions on this legislation.

[The prepared statement of Hon. Linda Fisher follows:]

PREPARED STATEMENT OF LINDA FISHER, DEPUTY ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman, and members of the subcommittee. It is my pleasure to appear before you today to discuss brownfields legislation. This is my first opportunity to appear before the House Energy and Commerce Committee as Deputy Administrator of EPA. I look forward to working with the members of the committee on this and many other issues in the future. I commend Chairman Gillmor, Representative Pallone, and all of the members of the subcommittee for developing brownfields discussion drafts that seek to promote the cleanup and development of brownfield properties and remove the barriers preventing the successful assessment, cleanup and redevelopment of brownfields across this country. While the Administration has a policy on not taking a position on a legislative discussion draft, I am pleased to say that the Administration supports the direction of many of the provisions that are being developed in Chairman Gillmor's discussion draft and we look forward to the opportunity to support a bill as the committee completes its work. As Governor Whitman has stated, enacting brownfields legislation this year is an important priority for President Bush and this Administration and we are committed to working with Congress to achieve that goal.

As we continue a more thorough review of the draft, and the committee continues its deliberations and introduces a bill, we would appreciate the opportunity to work with Chairman Gillmor, and other members, on legislative refinements that would be consistent with the President's principles and budget. EPA remains ready to work with all members of the Energy and Commerce Committee as we work for enactment of brownfields legislation this year.

Currently, EPA is working in partnership with States and local communities to promote the cleanup and development of brownfield properties. States are developing significant expertise in the cleanup and development of brownfield properties, and together with local communities, will continue to have the primary role.

Over the past few years, as EPA developed and implemented its brownfields program, we have seen that barriers may exist through uncertainty over Federal liability and the role of EPA authority in cases where a State has taken action. When a State approves a cleanup that is protective of human health and the environment, there should be limited circumstances where EPA would need to take further action. There should be a compelling reason for EPA to become involved in the cleanup. We do not want to stifle State cleanup programs and fail in our goal of removing barriers that prevent brownfields cleanup.

Brownfields cleanup is an important urban redevelopment tool that provides an alternative to development of greenfields. The Administration believes that brownfields legislation is important enough to be considered independently from other statutory reform efforts, such as Superfund. I know that some members of this subcommittee are interested in reforming Superfund and EPA remains ready to work with them, but I would continue to urge that Superfund issues not hold up brownfields legislation.

President Bush is committed to strengthen state and local brownfields programs based on the following principles:

- Brownfields legislation should remove a significant hurdle to brownfields cleanup by providing redevelopers with protection from federal Superfund liability;
- Brownfields legislation should ensure that states have the authority and resources to run their own brownfields programs while ensuring those cleanups are protective of human health and the environment;
- Brownfields legislation should direct EPA to work with the States to ensure that they employ high, yet flexible cleanup standards, and allow EPA to step in to enforce those standards only when necessary;
- Brownfields legislation should streamline and expedite the process by which grants are given to states, and in turn to local communities, so that they have maximum flexibility to use the funds according to their unique needs;
- The federal government should focus additional research and development efforts on new cleanup technologies and techniques to clean up brownfields; and
- While not under the jurisdiction of this committee, the brownfields tax incentive should be made permanent. The incentive expires at the end of 2003. The Administration supports legislative efforts to make the tax incentive permanent, which is reflected in the President's FY 2002 budget.

The States and the U.S. Environmental Protection Agency have been at the forefront of encouraging the cleanup and economic redevelopment of brownfields. EPA has awarded more than 399 assessment pilots of up to \$200,000 each to states, Tribes, and local governments to assist them with brownfields redevelopment. Grantees report that EPA funding supported assessments at over 2000 properties and helped leverage more than \$3.1 billion in economic development and generated more than 12,000 jobs. EPA's job training pilots have trained more than 640 people and put more than 480 to work. In addition, EPA has funded 127 revolving loan fund pilots, provided over \$90 million in funding for state programs, and worked with states to perform Targeted Brownfields Assessments at more than 570 properties.

However, much remains to be done to facilitate the rapid, high-quality assessment, cleanup and sustainable economic development in communities across the nation. With your help, this Administration is committed to providing the tools that communities need to address the problems posed by brownfield properties, and it is committed to encouraging redevelopment while fully protecting human health and the environment.

Chairman Gillmor's discussion draft, the Brownfields Revitalization and Environmental Restoration Act of 2001, is developing as a major step forward in encouraging the cleanup and development of contaminated brownfield properties. The draft authorizes grants and loan programs to identify, assess and clean up brownfields properties, and provides more flexibility to implement these programs.

The draft clarifies Superfund liability for contiguous property owners, prospective purchasers, and innocent landowners. While these provisions differ from similar provisions in S.350 and some previous legislation, we are prepared to discuss them with you and others as the committee continues development of a bill.

The real or perceived threat of federal liability can be a barrier to brownfields redevelopment. The draft places clear limits on federal enforcement authority for sites cleaned up under a state response program. Furthermore, this legislation also recognizes the necessity of striking an appropriate balance between providing the finality needed to induce redevelopment and ensuring the ongoing protection of public health and the environment. The draft does this by maintaining a federal safety-net granting EPA authority to respond to real threats to human health or the environment when a state is unwilling or unable to do so.

The provisions that provide for a federal safety-net are more limited than those found in S.350. EPA is concerned that a brownfields bill not place too great a limit on EPA authority and the federal safety net. We would like to work with the committee on these provisions as the committee continues to develop a bill. Whatever approach Congress chooses, we at EPA will only exercise Agency authority under compelling circumstances—as demonstrated by the Agency's history of never stepping in on its own at a brownfields site.

The Administration supports brownfields legislation that encourages the identification, assessment, cleanup, and redevelopment of a full range of contaminated brownfields properties by specifically authorizing a federal program for grants and loans to states, Tribes, and local governments. In addition, legislation should relieve EPA's current brownfields program of unnecessary Superfund regulatory procedures for the Brownfields Cleanup Revolving Loan Fund, and provide for expedited grant funding of cleanup of contaminated properties.

Brownfields legislation that is consistent with the President's principles should provide flexible grant funding to the states, local communities, and Tribes to support their brownfields programs in ways that will enhance the already impressive achievements of the 47 state programs that address brownfields currently. According to a study by the *Northeast/Midwest Institute*, more than 16,000 sites have enrolled in state voluntary cleanup programs. States with emerging programs would benefit from resources and support that enable them to use creative approaches in encouraging protective assessment, clean up and redevelopment of property. States with established brownfields programs, such as Ohio and New Jersey, would benefit from support that enhances successful brownfields redevelopment work.

The Administration also supports funding for technical assistance, training, and technology to encourage the best methods and approaches to cleaning up brownfields. New tools that improve the ability to conduct protective cleanups while reducing cost can help promote the redevelopment of brownfields across the Nation. EPA would like to work with the committee to address these issues as the committee continues work on the draft.

Whether states and localities receive Environmental Protection Agency grants for assessment and cleanup, Housing and Urban Development grants for redevelopment, Economic Development Administration grants—or whether redevelopment is encouraged by the Federal Brownfields tax incentive—this Administration is committed to providing the tools necessary to address the problem of contaminated brownfields properties.

Thank you for the opportunity to appear before you today to discuss brownfields legislation. I look forward to working with you to achieve swift passage of a brownfields bill.

Mr. Chairman, I will be happy to answer any questions you or the committee members may have.

Mr. GILLMOR. Thank you very much, Deputy Administrator. We do look forward to working with you, not only on brownfields but on a host of other issues.

And as you know, both sides of the Capitol have been working on brownfields legislation. Has USEPA, on behalf of the Bush Administration, endorsed any one bill?

Ms. FISHER. No, Mr. Chairman. We have expressed support for S. 350 with refinements, but we have not endorsed the specific language of any one bill.

Mr. GILLMOR. Last week there were certain press accounts that maintained that your agency had some concerns about finality provisions in my discussion draft, and later it was my understanding that there were some misunderstandings as to how my legislation really worked.

Now that you have had time to review the proposals, does the administration have any official position on that discussion draft?

Ms. FISHER. Yes. Let me say one thing. I think the Administrator was taken out of context. She was asked at a speech she was giving what she thought about, I think, the finality language in your bill. And, in fact, she hadn't really had an opportunity to even look at your bill.

Her comments on the finality language were more general in nature, and she was trying to express that she is very concerned that the debate over finality might actually get in the way of our achieving the enactment of brownfields legislation this year. And she hopes that doesn't happen and that we can work this out. So that is the context of her comments.

In terms of your particular bill or your particular discussion draft, we have had an opportunity to look at it. And as with S. 350, we do support it, but we would like to see some refinements.

Mr. GILLMOR. Thank you very much. As you may know, or will soon find out, many of the people on our subcommittee have questions about how USEPA is interacting with the States with regard to brownfields cleanup. And on March 7, the Administrator testified that uncertainty is what prevents people from maximizing the opportunity to clean up brownfield sites.

And the Administrator then added that, to her knowledge, USEPA "has never come in on our own to file an oversight, to take over the responsibility for a brownfield site." So my question to you has two parts. First, has there ever been an instance in which EPA has overfiled on a site? And, second, can I expect that since the agency's toward reopening the site has been consistent that this will be the policy of the Bush Administration in regard to brownfield sites?

Ms. FISHER. Yes. In terms of the past, as an agency we have not ever overfiled on a State at a brownfield site. And absolutely that will continue to be the policy of the Bush Administration.

Mr. GILLMOR. Thank you very much. I would like to explore one other area that the Administrator testified to on March 7, and she held that at that time it was a standing policy of USEPA to notify a Governor of its concerns about an ongoing State cleanup and to provide the State with a reasonable opportunity to correct the problem before USEPA could intervene. Would that still be the policy, and can we expect it to continue?

Ms. FISHER. Yes. Mr. Chairman, let me say both specifically to this program and generally, EPA really believes in working in partnerships with the States. And we don't try to take action at any site under any program, really, that the State is active at without working—without first trying to work very constructively with them.

And particularly in those programs such as brownfields where they have the lead we do everything we can to defer to them. And we will continue to have that policy.

Mr. GILLMOR. Very good. Let me just touch on the issue of petroleum contamination. S. 350 and the Democratic discussion draft provide a definition of brownfield site that does not adequately cover sites contaminated with petroleum. S. 350 and that draft excludes petroleum contaminated sites from liability protections and Federal enforcement actions even though the clean up was pursuant to an improved State cleanup program.

What has been called the Gillmor discussion draft takes a more expansive approach by including a broader range of petroleum contaminated sites within the definition of brownfields. One is EPA's view of expanding the definition of brownfield sites to cover more broadly petroleum contamination.

Ms. FISHER. Mr. Chairman, we are supportive of expanding the brownfields grant and loan program, so that it could include even the more contaminated petroleum site. And we would be happy to work with Congress to try to codify the provisions that would allow for the prospective purchasers of these sites to obtain liability protection.

We also would like to work with you to ensure that if there are further liability protections, that they are limited to the cleanup that is subject to the appropriate State oversight and don't go beyond what the State is working on, and that any liability protection does not apply to past owners or operators, and that it would continue to protect our ability to deal with any current regulatory requirements, particularly under the UST program, that would apply to those sites.

So with some drafting, we are open to expanding the program so it can cover a broader set of sites.

Mr. GILLMOR. Thank you very much.

Mr. Towns, we have concluded the opening statements. But if you have one you want to submit to the record, or if you feel a compulsion to make one——

Mr. TOWNS. No, no, no.

Mr. GILLMOR. [continuing] out of regular order——

Mr. TOWNS. No, Mr. Chairman.

Mr. GILLMOR. We would, of course——

Mr. TOWNS. I would be glad to submit my opening statement for the record.

Mr. GILLMOR. Thank you very much.

Mr. TOWNS. I would not interfere with the flow of the events of the meeting.

Mr. GILLMOR. Thank you.

The Chair recognizes the gentleman from New Jersey for questions.

Mr. PALLONE. Thank you, Mr. Chairman, and I am pleased to see that Ms. Fisher is here. I see behind you Mr. Krennick, who is also from New Jersey, and who I worked a lot with when he worked for Congressman Frelinghuysen. So I don't know—this New Jersey connection here in the EPA is a little dangerous. But——

Ms. FISHER. And you are from New Jersey.

Mr. PALLONE. That is right.

And then we have the Mayor of Elizabeth who is going to be here who will testify a little later, too.

I just very simply, if I could, Ms. Fisher—if S. 350, you know, passed out of the House and went to the President's desk, would he sign it?

Ms. FISHER. I never want to prejudge my President. We are very enthused to have this legislation passed, and we are hopeful that whatever legislation passes through the Congress the President will sign. We are hoping that we can——

Mr. PALLONE. So you are not going to tell me yes or no, but you are giving me a strong indication that he probably would sign it.

Ms. FISHER. I am hoping that he is going to sign any brownfields legislation that gets to his desk.

Mr. PALLONE. Okay. Now, 2 weeks ago my staff met with the senior career management officials in charge of EPA's brownfields program and the EPA's enforcement program. And they told us they were not seeking any changes or refinements to S. 350.

But now I just heard you say in response to the chairman that you were seeking refinements to both S. 350 as well as Mr. Gillmor's draft. So I guess I am confused. What specific changes

would the EPA and the Bush Administration seek to make to S. 350?

Ms. FISHER. Well, there are some different areas that we think would build a better program. We think that the way S. 350 addresses the connection between the NCP and the brownfields program is not quite drafted the way we would like it. We would like a little bit more flexibility there. That is one change.

We talked earlier about how S. 350 deals with petroleum. I think we could broaden that a little bit and still have a very protective program. But I think that some of these petroleum sites we wouldn't be able to deal with under the brownfields—particularly under the brownfields grant program, and we think that would be an improvement that we would hope the Congress would consider.

I think it is both the prospective purchaser and the liability section—we think with careful drafting we actually would add protection—under RCRA 7003. So there are some areas of modification I think that would make S. 350 a better bill.

Mr. PALLONE. Well, let me get to this liability issue, because, you know, as I said, I said that any bill I can support has to have a strong, effective Federal safety net. And when Administrator Whitman testified in March before this subcommittee she discussed a reopener in terms of where a site—you know, a particular site—and I am just going to give you her quote. She said, "Where a site became problematic and became a threat to human health or the environment in the context of the reopener."

Now, you know that S. 350 provides the reopener if a citizen or neighborhood may be facing an imminent and substantial endangerment to their health or the environment. And one of the major problems that I have with the chairman's draft is that he adds the sort of second concept to that by saying, "Additional response actions are likely to be necessary to address, prevent, limit, or mitigate an emergency, and the State will not take the necessary response actions in a timely manner."

It is this word "emergency"—in other words, we have the—you know, the imminent and substantial endangerment requirement from S. 350, but now he is adding this language that is saying the EPA would have to wait to bring an action until there is also an emergency.

And I notice that you in your statement said that the provisions that provide for a safety net are more limited in the Gillmor draft than in S. 350, and that you are concerned that a brownfields bill not place too great a limit on EPA's authority and the Federal safety net.

So would you oppose this additional requirement, this emergency language? It seems to me it is unnecessary.

Ms. FISHER. Well, and what we would actually like to do is work both with members of this committee and ultimately the Senate to come up with the right language that we think satisfies the need that we have and that you have raised, as have others, that there be a proper safety net.

Mr. PALLONE. But, I mean, do you have a problem with that reopener language in the Senate bill? Because I notice you didn't mention that as one of the refinements.

Ms. FISHER. In the Senate bill.

Mr. PALLONE. Right.

Ms. FISHER. We don't have a problem with the way the Senate has drafted their reopeners. But we are not wedded to any particular language. And so, you know, we are very happy to work with members of this committee and others to take a look at this.

Mr. PALLONE. Just let me ask you this—I know that time is up—but I just—what circumstance is required for an emergency? What possible benefit would there be by adding this other language about an emergency that the chairman has in there? Can you imagine any?

Ms. FISHER. What circumstances would give rise to an emergency that—

Mr. PALLONE. Well, why would you need this extra language in order to provide for the EPA to reopen the case?

Ms. FISHER. Well, we are not specifically asking for that particular language, and we have internally given some thought to, you know, what circumstances distinguish one—the opportunity to go in under one reopener versus the other. And so we are looking at what the differences of that would be.

I guess the most—a couple of things I think are important and worth noting. To date we haven't found an opportunity that we would need to go back in. And so in some ways we have this debate over language that is a bit absent from real-world examples. That is No. 1.

And second, again, I think we do want to try to strike the same balance that others have spoken of. And, you know, trying to parse the exact circumstances when one reopener would work and another wouldn't gets to be a little bit difficult.

Mr. PALLONE. Thank you.

Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman from Illinois.

Mr. SHIMKUS. Thank you, Mr. Chairman. I want to follow up on this discourse on—it is my understanding that when we use the terminology—I am not a lawyer, and so I have never gone before the courts and bought their language of law—

Mr. GILLMOR. You are fortunate.

Mr. SHIMKUS. Yes, I am fortunate.

Yes. No apologies, though.

But when the terminology that we use—my friend from New Jersey talks about imminent substantial endangerment. But always what is left off is “may present,” which is in front of that. And we feel—and I think part of our drafting has been that the “may present” portion allows you all to come in when there is not an imminent substantial endangerment.

And so the importance of the emergency provision of the Republican draft is in the hopes of, again, providing the legal certainty with the opportunity. So, in a discourse, if the “may present” was dropped and we use an imminent substantial endangerment to replace the emergency language, that is really the context of what we are trying to work on. I would like to hear your comments on that.

Ms. FISHER. I think that it is important to really take a bit of a step back here and appreciate the sites that we are actually talking about. EPA's enthusiasm over brownfields stems from a number of centers. One is obviously the wonderful good it is bringing

to the communities, that we are actually taking these old sites and getting them cleaned up and making them productive.

But another one is it is really addressing a class of sites that the Federal Government doesn't have the time or the resources to deal with. And we are not really looking at them, by and large, under the Superfund program or our authority.

So we have worked over the past several years to get States to have programs so that they can address these sites. And the brownfields are, in a sense, a subset of all the sites that the States are really working on.

So from the beginning these are sites that we really are looking to the States to have the lead. The discussion of will we come back in by its very nature has to be taken into that context. I mean, these are sites that—they are not our priority. They are on someone else's priority list.

So the chances of us coming in are truly going to be focused on only those, you know, very unique circumstances where something has gone wrong at the site and the State is not on top of it. That situation has not occurred under the brownfields program to date—no, really under the Superfund program where States have already taken the lead on a number of big cleanups.

So I think that context is important because people are reading the language I think with the fear that at these, you know, hundreds and hundreds of brownfield sites we are really hanging over people's shoulders waiting. And the reality is we have stepped very far back from these sites.

Mr. SHIMKUS. But it is our understanding under the courts and the ruling that the—again, the “may present” has—the courts have always consistently ruled this in a very broad area. And it is not the emergency type situation that we are concerned it may present—

Ms. FISHER. The “may present”—

Mr. SHIMKUS. [continuing] to present the chilling effect which then slows up investment and it is not—it provides uncertainty. And the whole aspect of a brownfields bill is to get legal certainty.

Ms. FISHER. The “may present” language under the Superfund program has been interpreted broadly. That is true. The way it is applied here—again, given the context of the program and where we are headed with it, it is not our intention or practice to be going back into these sites unless there was a very serious problem there, and, again, that the States weren't dealing with it.

Mr. SHIMKUS. Okay. And I will just continue. Our position is—I think we are very supportive, if we can define emergency life, health, safety concern. What we are not supportive of is an overly broad “may present,” which, again, continues to throw a chilling effect.

So if there is language that we can work with the ranking member to I think approach his concern on life, limb—and I agree with you. I mean, these are brownfield sites. They are not Superfund sites. And that is where we want to get to, and I think we would encourage any evaluation from you all to help us get at a point where you all can come in. But it had better be for emergencies, and it should not be for something other than emergency situation.

Mr. Chairman, if she would like to respond—if not, I will yield back my time.

Ms. FISHER. We will be glad to work with you.

Mr. GILLMOR. The gentleman from New York. Do you have some questions?

Mr. TOWNS. Yes. Thank you very much.

Ms. Fisher, since 1996, the EPA has deemed it important for State programs to meet six baseline criteria as a condition of entering memorandum of agreements with a State to limit EPA's enforcement discretion. I believe 16 States have finalized and probably more are underway.

The State qualifying criteria, which is on pages 55 and 56 of the Democratic draft, are modeling the EPA's baseline criteria and were supported by the EPA in testimony in the last Congress. If the EPA thinks it is a good idea for a memorandum of agreement with States, wouldn't you agree that a volunteer program should meet these basic criteria before EPA's enforcement authority is restricted?

Ms. FISHER. Mr. Towns, we are comfortable having, which I think we currently do, policies and guidance for the States in terms of how they develop their programs. We don't really want to get into having to authorize or approve every State program, because States are approaching these very differently, and so we—I think we would like to have perhaps not quite the level of rigor that we think is anticipated in the Pallone draft where we actually have to approve all of the various State programs. We would much rather have it be a little bit more flexible, but give the States clear guidance on what would be expected in terms of how the programs are.

Mr. TOWNS. Well, in other words you are saying—you know, I just think we need to have a baseline, because some States, you know, are more eager to clean up than others. And I think that is—you know, and I come from a State where the Governor has been really good on these kind of issues.

But I know other States where that is not the case, and I just feel that you sort of have a responsibility to say, "This is where we are, and you have to meet these guidelines." You know, and I think that we have to have a base.

Ms. FISHER. And I think we can do that in terms of laying out the criteria of what States need to have to get the grants and loans.

Mr. TOWNS. Right. In New York and throughout the country, many brownfield sites are located in economically disadvantaged or minority communities. Title IV of the Democratic draft addresses this problem by setting up a commission to evaluate the concentration and impact of brownfield sites on these communities. Does EPA have a position on this issue?

Ms. FISHER. Yes. First of all, let me say that, because it is important in the context of the Democratic draft, we have a very active Office of Environmental Justice that is in fact active on helping us—or working with the brownfields program and working with the program as they make grants to States and the communities for these particular sites. They are active even in helping select the sites.

In addition to that, we also have a National Advisory Committee on Environmental Justice that gives a national perspective and, again, focuses not only on this program but other parts of EPA.

So our feeling on this section is I guess twofold. One, we are not sure it is a necessary addition to what we already have operating and that is actually operating quite aggressively at some sites. And, specifically, it gives this new group I think a veto in terms of—a veto over both the Federal and the State programs that are already underway.

So we totally appreciate the importance of the environmental justice community. I guess I would ask that you look at what we have underway and see where what we have that is not working or not working successfully before we set up what would be a third environmental justice effort, particularly given the fact that they are all really looking at the same sets of sites.

Mr. TOWNS. I hear you. Let me say that I agree with the whole idea of some flexibility. I think that is very, very important. I would even go further than some by saying based on what you are going to do with the brownfield, and all of that, I mean, it also determines it in terms of the level.

But I really think you need to have some kind of baseline, and I think that is something you need to really look very carefully at.

Ms. FISHER. Okay.

Mr. TOWNS. Thank you very much. I yield back, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Towns.

The gentleman from Oklahoma.

Mr. LARGENT. Thank you, Mr. Chairman.

And we welcome you, Ms. Fisher, before our committee for what will be the first of many such meetings, and we are glad you are here. Welcome to Washington.

You mentioned that you felt like that the potential exists at least to improve upon S. 350, which is what we are trying to do. And there has been several attempts, both on the Republican draft and in the Democrat draft, to try to do so.

And I guess I wanted to follow up first on—well, follow—ask you three questions specifically about three issues specifically that are found in the Democrat draft, and ask you if you feel like as representing the EPA that they improve S. 350.

And the first would be this Environmental Justice Commission. It is my understanding that this particular provision that is contained in the Democratic discussion draft would provide for authority to an Environmental Justice Commission to waive the Federal enforcement protections provided under Federal law at all sites in a particular State whenever 3 of the 5 members of the commission determine that citizens in any minority neighborhood are not being provided meaningful opportunities for participation.

Does the EPA believe that giving three non-elected members of an advisory commission in Washington, DC the power to waive Federal protections for brownfields sites in my State, based on a complaint by one neighborhood in my State, seems—it seems to me that that is fraught with problems for potential—potential problems and potential abuse.

Ms. FISHER. Well, I was saying we do already have a very aggressive environmental justice program at EPA. We have found—

and they are very active at many of the brownfield sites, and we have found that has been an essential part of making these sites successful in communities.

I would encourage the Congress to look at the program we have at EPA—we also have a National Advisory Committee that looks not only at brownfields but some of our other programs—and see where those two efforts that are currently underway perhaps are missing the mark before we set up a third environmental justice initiative.

So it is not that we don't think these are important components, an important attribute to be dealt with at the brownfield sites. We just already have two vehicles underway that we think brings the environmental justice—

Mr. LARGENT. So you feel like the protections that you have currently—that currently exist are adequate?

Ms. FISHER. Yes. I think the programs we have are adequate.

Mr. LARGENT. The second question I have, it is also another item that is contained in the Democratic discussion draft, is applying Davis-Bacon to the over \$1 billion in grants and loans authorized by this legislation. Do you feel like—does the EPA think that this will increase the cost for the cleanups, by applying Davis-Bacon to all cleanup funds?

Ms. FISHER. I know that Davis-Bacon is an important issue to a lot of members. From our perspective, it is not really a brownfields issue, and we would rather not see it dealt with in this bill.

Mr. LARGENT. Okay. And the final thing is, also contained in the Democratic discussion draft, it contains an additional \$20 million for worker training grants that includes life skills training for employees at nonprofit organizations. Why do we need that in a brownfields bill?

Ms. FISHER. From our perspective, we don't think we need a separate program for worker training. Under our current brownfields program, however, we do have very successful worker training programs at some of these sites, where we have actually been able to train some local residents, particularly in intercity areas.

And we would like to preserve the ability to use brownfield grant and loan programs for worker training. And if we can do that and maintain that ability, we don't think there is any reason to set up a separate program with a separate—

Mr. LARGENT. And do you do life skills training?

Ms. FISHER. No, we don't.

Mr. LARGENT. What is life skills training?

Ms. FISHER. Well, I can tell you what I think it is. And, actually, I think some of the Department of Labor work training programs have a component. And it is my understanding basically it helps teach people how to—the components of, going to work.

For some of our chronically unemployed people, understanding and knowing just the personal habits of what it takes to get to work on time and be ready to go to work are part of the training that the Department of Labor I think includes in some of their programs. But it is not what ours encompasses.

Mr. LARGENT. Okay. I had one other question.

Ms. FISHER. Okay.

Mr. LARGENT. Knowing that the Secretary at EPA was also a former Governor, I am wondering if she believes that a site should be listed on the national priorities list without the concurrence of the Governor of any given State.

Ms. FISHER. That is an issue close to her heart as a former Governor. And as you may or may not know, it is the EPA policy to seek the concurrence of Governors before we list sites on the NPL. And, in fact, we have done that in every instance.

I think our feeling is it is not really a brownfields issue. It is something we think our policy is adequately covering. We haven't had any real complaints from Governors. I think there has only been one site that we even had a dispute with a Governor, and that site hasn't been listed yet.

So we think it is—our policy is taking care of it, and, again, I am not sure it is something we really have to deal with in the brownfields bill.

Mr. LARGENT. Thank you.

Mr. Chairman, I yield back.

Mr. GILLMOR. The gentlelady from Missouri.

Ms. MCCARTHY. Thank you, Mr. Chairman.

I would like to ask just a couple of questions in followup to some things that we have been talking about here today. When Administrator Whitman was with us, I talked with her about something that her State and also I think it was the State of Wisconsin had done very successfully, which was to post on the website an inventory of brownfields locations that were being cleaned up, worked on, identified, etcetera—very successful in both of those States. And she embraced the concept at the hearing as something that she would like to see done.

S. 350 provides for a public record of voluntary cleanup sites in Title III. The discussion draft before us today does not. I am not asking you to take sides, but the Administrator, you know, has done it in her own State when she was Governor, embraced it as a concept for our consideration. Could you give the committee some insight on why it would be important nationally to have this?

And second thought while I get my moment, and then I will turn it over to you, is, I would like some thought on your feelings on whether or not we should have a floor or a ceiling when we address these petroleum contaminated sites.

The funding issue is different in S. 350, and the discussion draft of the chairman, you know, S. 350 requires a \$50 million, you know, total grant, but I think 25 percent be made—must be made available to petroleum contaminated sites, and the chairman's discussion draft kind of does this sort of no more than 25 percent.

So you can go from zero to 25 percent on petroleum contaminated sites—of the money. So it is a concept of whether you have a floor guarantee of \$50 million or, you know, a ceiling of no more than—up to 25 percent.

Will it matter? Because this petroleum cleanup issue is huge in urban areas all over this country. And the way funding and appropriations works up here is sometimes mysterious.

Could you offer some philosophical thoughts on which direction it would be better to go for facing the issue nationwide?

Thank you.

Ms. FISHER. So I am going to give you an answer that is neither. How about that? I think the most important limit is actually the \$1 million limit, because that assures that we won't kind of lose whatever amount of funding we allocate to any one site.

I think your point is correct. There is a huge number of these petroleum-related sites, a lot of corner gas stations that are boarded up and are creating problems in neighborhoods, and even some tank farms. And that is why we were supportive of actually expanding the concept to include the larger sites.

So I think the \$1 million limit is an important one. We haven't really focused—we can do that—on whether the 25 percent or the \$50 million is better. Your comment is correct. Probably the appropriations won't contemplate either. So it will—

Ms. MCCARTHY. Having been a State legislator, and, you know, understanding that when the Federal Government speaks and wants us to do this then they don't provide the money, this sort of unfunded mandate thing that we actually—

Ms. FISHER. We feel that way at the agency—

Ms. MCCARTHY. [continuing] that we wouldn't do any more. Okay.

Ms. FISHER. [continuing] when Congress asks us to do something and doesn't provide the funding.

Ms. MCCARTHY. I would appreciate your getting back to me on some thoughts on that.

Ms. FISHER. Okay. But I guess I would say I think, just to emphasize, we wouldn't want to lose the \$1 million limit.

Ms. MCCARTHY. Right.

Ms. FISHER. Because I think that is the one that assures we can get to a large number of sites.

On your other issue about the listing, it is true a lot of States do have a publicly available list. And I think those have been helpful in many instances to people who want to find property that might be eligible for this and start the initiative to clean it up.

I think on the other side, although I haven't had a chance to talk to the authors about this provision, I think there is concern about stigmas—the stigma of being associated, as a contaminated site. But we have seen the listing work pretty well in States that have it thus far.

Ms. MCCARTHY. We will do a little more research on New Jersey and whether there was a stigma or not. I thank you for your answers.

Mr. Chairman, I yield back.

Mr. GILLMOR. The gentlelady yields back.

The gentleman from Nebraska.

Mr. TERRY. Thank you, Mr. Chairman.

I appreciate your being here today. I do want to follow up with my opening statement that I strongly believe that a strong Federal safety net with broad reopeners is counterproductive to some of the goals—the goals of encouraging States to take control of brownfields, encouraging redevelopment, encouraging subsequent purchasers.

I really believe that if—with broad reopeners that we chill everything that we want to occur here. And I am telling you from my real-life experiences that even though you may say, "We don't go

back in, that we are pushing ourselves away,” that subsequent purchasers, because of that chance that you may come back in, see the EPA and the Federal Government as “hovering over.” That is their perspective. You have a different one of seeing yourself being—pushing yourselves away. We have heard on the record before that there hasn’t been an incident where the EPA has come back in. That is still not good enough.

So I want to work through an issue here to kind of highlight or show as an example of what I am trying to refer to here. When you have a reopener like imminent threat to public health and environment, it is such a broad term.

For example, cleanup along the Missouri River where there is arsenic in the soil. The cleanup as it currently sits—you know, this is just kind of a hypothetical. I am sure this would never happen in real life, but let us just set it for hypothetically. A cleanup occurs, massive cleanup of property, taking away six feet of dirt, replacing it with clean dirt. But it leaches out still into the river at about 30 parts per billion.

I mean, I would never say that the standard would be 50 parts per billion, and a new administration would come in and lower it to 10, let us say, just in theory, hypothetically.

See, that is what people worry about is that 1 year it is not a threat to public health at 50 parts, because that is the current standard, but maybe just theoretically a new administration comes in and lowers that, with the EPA working to help that to a lower standard that now puts it below. It wasn’t a threat 1 year, but the next year it is a threat.

The Environmental Defense Fund comes in because you have pushed yourself away. Now the courts are saying that, gee, the EPA’s own standards, this is now an imminent threat because the leaching is occurring currently. And it is a threat to public health.

You know, this is the type of thought process and discussions that are going on in real life. So I just want to point that out as an example of how people perceive the Federal Government and EPA continuing to hover.

But let us just—here is my specific question to you, then. On this type of example, let us say the Environmental Defense Fund is successful in asking the Federal court to force the EPA to come in and say, “This needs to be cleaned up because the standards have changed.” Would the EPA support, at least in those circumstances, allowing the States to stay in control of the cleanup? Allowing us some language where States continue to be in control, is that possible?

Ms. FISHER. Absolutely. I mean, our goal is to let the States take the lead on these sites and continue to ensure their protection. I guess—and I may seek the advice of counsel on this—the question you raise is something we would face at any Superfund site, and we don’t go back because we have changed, a safe drinking water standard—you referred to arsenic—and redo every Superfund site that we have cleaned up.

So I am not quite sure that that situation would give rise to our going back in. But to answer your real question—

Mr. TERRY. The subsequent purchaser is still out there wondering, though.

Ms. FISHER. Well, a subsequent purchaser—we think the prospective purchaser protection in this is probably one of the most important components of the bill and gives——

Mr. TERRY. Absolutely.

Ms. FISHER. [continuing] gives them, I think very good protection under it. And, you know, when we talk about our goal in getting this bill passed, I mean, clearly that—that is going to be I think a critical component of it.

Mr. TERRY. Just one quick thing. I want to follow up on something on Davis-Bacon that my friend from Oklahoma, Mr. Largent, brought up. Have there been any instances where communities have backed off or recipients of grant money have backed off because of Davis-Bacon?

Ms. FISHER. I am advised that there have been two.

Mr. TERRY. Where? Do you know? That is interesting.

Ms. FISHER. I can get back to you on what those are, but——

Mr. TERRY. I would appreciate receiving that.

Ms. FISHER. Okay.

Mr. TERRY. Real-life examples are important to us. Thank you.

Mr. GILLMOR. The gentleman from Louisiana, the chairman of the full committee, Mr. Tauzin.

Chairman TAUZIN. Thank you very much, Ms. Fisher, for being here today. I wanted to take you through a couple of broad position questions and then ask you a few specific ones. First of all, does your Department support ensuring the brownfield sites are not treated like Superfund sites?

Ms. FISHER. That is a broad question. I am not sure specifically what you mean, but our goal is to particularly get these sites through a much different, more flexible program, which is what we are structuring here in terms of the underlying program.

Chairman TAUZIN. Then the answer is yes.

Ms. FISHER. Yes.

Chairman TAUZIN. You believe that this program ought to be different from the treatment provided for Superfund sites.

Ms. FISHER. Yes.

Chairman TAUZIN. Second, do you believe that the bill that we pass, the program we provide, should provide needed relief to innocent parties from Superfund's overly broad liability scheme?

Ms. FISHER. Yes. We support the prospective purchaser in this.

Chairman TAUZIN. And do you also believe that the bill ought to increase the certainty for property owners and developers to encourage participation in the State cleanup programs?

Ms. FISHER. Yes. Yes, we do.

Chairman TAUZIN. We can argue about how certain, but we——

Ms. FISHER. Right.

Chairman TAUZIN. [continuing] certainly those are broad principles. Do you also believe that we ought to extend coverage of Superfund policy to petroleum contaminated sites?

Ms. FISHER. We think we should include coverage of brownfields to some of the petroleum sites, yes.

Chairman TAUZIN. Thank you very much. Let me ask you two specific ones. The first one is in regard to the question of EPA's role in regard to the State cleanups.

Let me first thank both the Democratic members and their staff, as well as you, Mr. Chairman, for putting discussion drafts before us. I think it is very helpful. In examining the Democratic discussion draft, there are several changes to the Senate bill that I want to ask you about.

Am I correct in my understanding that it is not EPA's desire to increase its authority with respect to State cleanup programs or to oversee them?

Ms. FISHER. That is correct.

Chairman TAUZIN. So that you do not support the notion of an upfront approval by EPA of the cleanup.

Ms. FISHER. That is correct. We are very comfortable having principles and guidelines that a State program would be expected to meet. But we don't want to get in the situation of having to approve all of the different programs some of the States run.

Chairman TAUZIN. Second, in order to get brownfields cleanup accomplished today, approval has to be obtained from a number of different agencies regarding the environmental impacts of this cleanup.

The suggestion we make in our discussion draft is that EPA, on its own rulemaking—we don't tell you how to do it or what to do or certainly not to diminish the environmental requirements of those permits, but we suggest a one-stop procedure for this to accommodate to the state's needs to expedite and get less complicated bureaucratic approval of their cleanup plan.

That is, we suggest a rulemaking that would combine a single permit process respecting all of the agencies that have some current say in that process. Do you support that notion?

Ms. FISHER. Here is the issue with that. By and large, we are talking about state-delegated programs. EPA has delegated already to the States the authority to write the permits under the clean air and the clean water and the RCRA laws.

So our challenge in doing a Federal rulemaking on this now is how we should structure that kind of a program that kind of tells all the States who run their different permitting—

Chairman TAUZIN. Don't we have a permit waiver for Superfund cleanups right now?

Ms. FISHER. There is a permit waiver under Superfund because under Superfund, first of all, most of them are run at the Federal level. And, second, Superfund itself provides a lot of the procedures that are very similar to what we would require under the Federal programs.

Chairman TAUZIN. What we are suggesting is not changing the necessities, nor would we suggest exempting any party, any State from compliance with the Federal standards. What we are simply asking is: would you support—we would love to give you the authority to do it—a process whereby your agency could provide a streamlined permit authority for the States to move forward once they have satisfied this regulatory process, that the State is meeting all of the other requirements of the other agencies. To put it simply: a one-stop shopping permit for States to expedite brownfield cleanups.

Ms. FISHER. And I am not opposed to States doing that. In fact, some already have.

Chairman TAUZIN. I am asking you: would your agency be supportive of our attempts to give you the authority to set up such a structure at the Federal level?

Ms. FISHER. Yes. We will take the authority to look at it. The——

Chairman TAUZIN. To look at it.

Ms. FISHER. Yes. Here is the problem——

Chairman TAUZIN. You can look at anything. You don't need me to tell you to look at it.

Ms. FISHER. Because I am not quite sure of the problem I am trying to fix. We have already delegated the permit programs to the States. They have the authority to set up one-stop shopping if they want to, and some of them already have.

To the extent the Federal Government is creating a roadblock from States doing it, we definitely would be happy to look at it. And if a rule—if we could do a rulemaking and that would fix some of those problems, we would be happy to do that. But——

Chairman TAUZIN. Let me try to simplify it, because we are getting a little complex. Are you supportive of the Gillmor provisions which authorize a streamlined process?

Ms. FISHER. I am supportive of the provision if it includes the ability to include both substantive and procedural requirements, that if we did a streamlined permitting process we would be able to maintain substantive and procedural requirements.

Chairman TAUZIN. All it does is authorize a rulemaking which you conduct.

Ms. FISHER. Right.

Chairman TAUZIN. Are you not comfortable with that kind of an authority in——

Ms. FISHER. All it does is authorize us to do that. We will be happy to take the authority.

Chairman TAUZIN. Would you exercise the authority?

Ms. FISHER. Yes, as long as I can figure out what the problem is we are trying to solve.

Chairman TAUZIN. We will help you see that.

Thank you very much, Mr. Chairman.

Ms. FISHER. That is great. I am more than happy to do that.

Mr. GILLMOR. Thank you, Mr. Chairman.

The gentleman, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman. I hope I am not too much out of sync here having just walked in.

I am concerned, Ms. Fisher, about the provision in the draft legislation which would I think significantly curtail the EPA's protective authority without adequate assurances that States would pick up the slack. I am particularly troubled by Section 302 of the discussion draft which would give a Governor veto authority over the listing of any Superfund site.

What concerns me—there are a couple of things that concern me about this. What if you have a situation where a mayor, county executive, local health officials feel one way and the Governor feels another way. Who should have the greater sway in that situation?

Ms. FISHER. I think the provision you are talking about is the requirement for Governor's concurrence before we list a site on the NPL. And as I said earlier before you came in, it is our practice, really, at the agency today to get the Governor's concurrence before

we list a site on the NPL, and we have actually done that in every instance.

There is one site that we propose that we don't yet have the Governor's concurrence, but it has not gone final. So my sense is I think our policy gets us where we need to be, and I am not sure that we would recommend having this provision put in the brownfields bill. It is really a Superfund issue. It is not really a brownfields issue.

Mr. BARRETT. So you don't think that that provision is necessary?

Ms. FISHER. Right.

Mr. BARRETT. Okay. That is the only question I had.

Mr. GILLMOR. Thank you, Mr. Barrett.

The gentleman from Maryland.

Mr. EHRLICH. Ms. Fisher, thanks for your testimony today. It has been clear, concise. Appreciate it. Congratulations.

Ms. FISHER. Thank you.

Mr. EHRLICH. I particularly appreciate I guess the philosophical drift I am hearing here with regard to Governor attention from your agency and allowing the States to do what you want them to do. That is an answer with regard to various questions.

As you all know, money here and money issues are relatively easy in this context. That can be worked out. It is the real issue with regard to autonomy and State finality, and you have heard about 14 different questions asked different ways with different nuances regarding the importance of finality, the Gillmor draft language with regard to the singular issue of finality.

Could you give me your concise policy statement with regard to that issue? And then I want to get into Davis-Bacon for a second—the easy stuff.

Ms. FISHER. We totally share the interest of the committee to strike the appropriate balance between the need for finality—

Mr. EHRLICH. Okay. That is a platitude. I want to get the answer to—I want to get specifically your policy, your current policy, your opinion with regard to the Gillmor draft.

Ms. FISHER. In terms of the Gillmor—

Mr. EHRLICH. Finality.

Ms. FISHER. The finality provisions?

Mr. EHRLICH. Correct.

Ms. FISHER. Well, we would like to continue to work with the chairman to make refinements to it.

Mr. EHRLICH. Okay.

Ms. FISHER. Okay.

Mr. EHRLICH. Let me get back and try to ask a question with regard to Davis-Bacon. And you had—one of your counsels helped you with regard to two instances where there has been a backing off because of Davis-Bacon. Can you give me—or can one of the counsels give me precisely the application of Davis-Bacon in this context? I am not sure what the application is.

Is it simply a general application because your agency is involved and Federal dollars are involved? Is it a function of that?

Ms. FISHER. Currently, the brownfields program is run under Superfund.

Mr. EHRLICH. Right.

Ms. FISHER. And the funds come pursuant to Section 104 of Superfund.

Mr. EHRLICH. Right. Federal dollars.

Ms. FISHER. And Davis-Bacon applies to that. So that is what triggers it.

Mr. EHRLICH. This may be a difficult question, but I would ask you to put the answer in written form. With regard to the two instances cited earlier, the specific facts and the chronology of events that lead to the conclusion that is pretty relevant to us here regarding this language.

Ms. FISHER. Can I provide that?

Mr. EHRLICH. you sure can.

Ms. FISHER. Okay.

Mr. EHRLICH. Thank you. I will yield back.

Mr. GILLMOR. Thank you very much.

The gentleman from New York.

Mr. FOSSELLA. Thank you, Mr. Chairman.

Just to follow up briefly—it has been asked twice—on the Environmental Justice Commission. I was wondering whether aside from the merits of whether it is necessary or not—and I gather from your discussion that it is—you don't believe it is necessary—whether it is, or, in the opinion of counsel, is it even constitutional to empower this commission to potentially override Federal law? Do you have an opinion on that?

Ms. FISHER. I don't right now. I can—it is not a question I have put to our counsel and would want to have a little bit more opportunity to think about it before we respond.

Mr. FOSSELLA. Is it possible to ask your counsel and then forward it to me or—

Ms. FISHER. Sure, we can get—

Mr. FOSSELLA. [continuing] this committee as to the constitutionality of that? Thanks.

And just look at environmental justice through a different prism. I believe—you probably believe that if something is harmful or unhealthy to one individual, it doesn't matter what color or creed you are, right?

Ms. FISHER. Correct.

Mr. FOSSELLA. We had a situation on Staten Island, home to—was home to the Fresh Kills landfill, it was the largest landfill in the country, 3,000 acres—and, fortunately, we closed this landfill this year.

But over the past few years while the city of New York embarked on closing the landfill there were efforts around other parts of the city that had to now assume some responsibilities. In short, all of the residential garbage generated in the city of New York was dumped on Staten Island at the landfill.

So once it became apparent that other parts of the city had to assume a degree of responsibility, we started seeing lawsuits. And one of the actions brought was under the jurisdiction or pursuant to environmental justice regarding a transfer station or a potential transfer station in an area of the Bronx.

To my knowledge, that is still open as to whether, you know, EPA has an opinion. I am not sure. The fact of the matter is that you had a community, just by nature of its demographics, that

were allowed to bring an action pursuant to environmental justice, that the EPA spend a lot of money and time reviewing it, and yet when we try to bring the same action pursuant to environmental justice regarding the Fresh Kills landfill—again, the largest open landfill in the country—we were denied because we didn't meet the criteria.

I just found it odd that how the same government can look at an open, unlined, environmentally unfriendly, unsafe landfill and say you do not have a cause of action under environmental justice, and just because of the makeup of your community and demographics, and look at a transfer station minuscule in comparison and say you do.

So I would just urge you—I know you mentioned that you have a lot of folks who are very aggressively pursuing environmental justice. If you take back that—there is another side to the story and another side to other perspectives on this matter.

So with that, thank you.

Ms. FISHER. Okay.

Mr. GILLMOR. Thank you.

The gentleman from New Hampshire.

Mr. BASS. Thank you very much, Mr. Chairman. My question will be very quick.

Both of the bills, the Senate bill and the House bill, have authorized \$200 million. The agency isn't spending anywhere near that much. Why aren't you and will you be able to? Is that too quick a question or should I elaborate more?

Ms. FISHER. No, I understand the question. I think the program is currently limited because it is basically an offshoot of Superfund and doesn't have its own funding authority. And I am advised that we basically get a separate appropriation for it that comes from the—

Mr. BASS. Is it a \$100 million appropriation now?

Ms. FISHER. It is \$90.

Mr. BASS. Ninety. How much of it have you spent, for example, in the last—any fiscal year? Are you spending what is getting appropriated?

Ms. FISHER. Yes, we are.

Mr. BASS. You are? Okay. But that—Okay. I understand. So there is a difference between the appropriation and the loan program that you have, which you are not spending very much money at all on, is that right?

Ms. FISHER. The loan program is much smaller.

Mr. BASS. Very small. All right.

That is the only question I had, Mr. Chairman.

Mr. GILLMOR. Thank you very much.

The gentleman from—

Mr. BASS. I understand that—excuse me, reclaiming my time—if we do authorize \$200 million, you are going to be able to spend it?

Ms. FISHER. We usually, working with the Appropriations Committee, are able to spend what they give us. And they generally—

Mr. BASS. All right. That is fine. I understand.

Ms. FISHER. [continuing] give us far different than what is authorized.

Mr. BASS. Thank you very much, Mr. Chairman.

Mr. GILLMOR. The gentleman from Indiana who has been waiting exceedingly patiently.

Mr. BROWN. Ma'am, I have the largest Superfund cleanup site by money in Continental Steel in Indiana. And I want to extend compliments. It has been a long time, but the site is moving, and you are doing some pioneering work out there. It is a state-led site. But I want to extend the compliments, and please let everyone know.

Ms. FISHER. Thank you. I will share that with the staff.

Mr. BROWN. I also want to extend compliments to Mr. Pallone and Mr. Gillmor. Putting the discussion drafts out is very helpful to all of us. I am concerned—here is a question I have for you.

If the intention here of brownfields really is to provide greater flexibility, incentives, and the resources to State and localities, to put these sites back into productive use, in the Democrat discussion draft it adds minimum criteria for State programs to qualify for funding and Federal enforcement and liability protections, and it requires EPA to determine if these criteria have been met upfront. Could this hamper such cleanup efforts by States across the country?

Ms. FISHER. Yes. We would prefer a bit more flexibility than what is provided there. We would rather not get in the situation of having to approve every state's program. Some of them run their brownfields under a couple of different cleanup programs.

We do think, however, States do need to have guidance and principles about what their programs are going to look like. We think we can manage that through our grant program. So we do have some handle on being sure that the States have met some criteria, but we don't want to get into affirmatively having to prove each of these.

Mr. BROWN. Right. I want to thank you for working with the chairman on the subsequent purchaser liability protections.

I yield back my time.

Ms. FISHER. Thank you.

Mr. GILLMOR. The gentleman yields back, and that concludes the questions. I want to, once again, thank you for coming. We do look forward to working with you in the very near future to produce a product that we can all support without refinements.

Ms. FISHER. Thank you, Mr. Chairman.

Mr. GILLMOR. We have a series of three votes which have started, and I think we will recess the panel now, so that we can take those votes, and come back at 12:45 and start the second panel. And the meeting stands recessed.

[Brief recess.]

Mr. GILLMOR. The subcommittee will reconvene, and we will begin with panel two. And I, once again, want to express my appreciation to all of you for coming, and we will proceed with your opening statements. We have your full testimony, and hopefully you can summarize it in about 5 minutes, and then we can go to questions.

Ms. Crotty?

STATEMENTS OF HON. ERIN M. CROTTY, COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, STATE OF NEW YORK; HON. JAVIER GONZALES, COMMISSIONER, SANTA FE COUNTY, NEW MEXICO; HON. J. CHRISTIAN BOLLWAGE, MAYOR, CITY OF ELIZABETH, NEW JERSEY; HON. LEON G. BILLINGS, STATE OF MARYLAND LEGISLATOR; AND GORDON J. JOHNSON, DEPUTY BUREAU CHIEF, ENVIRONMENT PROTECTION BUREAU, NEW YORK ATTORNEY GENERAL'S OFFICE

Ms. CROTTY. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here today to share with you the position of the State of New York, as well as The Environmental Council of the States, on an issue that is so important to public health and environmental protection as well as our economic and social well being for our citizens.

I am also fortunate to have the opportunity to, once again, work with Congressmen Fossella and Towns, who are incredible advocates for brownfields redevelopment, and New Yorkers are truly fortunate to have them representing us here in Congress.

Governor Pataki, Congressmen, asked me to relay to you the State of New York's strong support for congressional action that will make it easier for States, local governments, and private entities to investigate, remediate, and ultimately redevelop brownfields. Under Governor Pataki's leadership, New York is considered actually a national leader in brownfield cleanup and redevelopment.

We think that creativity and innovation at the State level has been the hallmark of cleaning up and redeveloping many brownfield sites, and we have a lot of programs in New York State that are geared toward brownfields cleanup and redevelopment.

But one I want to highlight because it is important to you if your initiative passes and that is the—in 1996, the Governor proposed and championed a \$1.75 billion bond act. Of that amount, \$200 million is available to municipalities to investigate and remediate brownfield sites.

Right now, it allows a grant of 75 percent of eligible costs. The Governor has proposed legislation to increase that to 90 percent and to actually allow other State and Federal funds—importantly here, Federal funds—to be used for the 10 percent local match.

So if the Governor's changes are enacted by the legislature, it will enable municipalities to utilize the funding provided under your initiative for their cost share, thereby achieving truly the Federal/state/local partnership in addressing brownfields and further leveraging our scarce public dollars.

We really believe that as Federal and State policymakers we need to level the playing field between greenfield development and brownfield redevelopment. And as we create programs and policies to revitalize our urban areas, we need to make certain that the programs to investigate cleanup and redevelopment brownfields are the very foundation of those initiatives. And in many areas, without an effective brownfield strategy our attempts to revitalize our urban areas will be lost once again.

In New York State we have over 20 years of experience in cleaning up contaminated sites. And we believe that the most important

need for Federal legislation is to provide liability relief for those that are not responsible for the contamination in the first place and finality to the cleanup process.

And if you look at it from that perspective, certainly all of the bills that are being discussed in Congress, the Senate bill and the two House discussion drafts, address those concerns. However, we believe that the House majority draft provides the greatest benefit to municipalities and non-responsible parties that volunteer to clean up sites for three primary reasons.

First, it provides a mechanism for finality. It requires gubernatorial concurrence for listing a site on the national priorities list. And it provides much needed funding for the investigation and cleanup of brownfields. Let me go into detail just briefly.

First, the House majority draft expands and enhances the finality language included in Senate bill 350, which is vital to improving the effectiveness and the pace of brownfield cleanups. There is no question that brownfield redevelopments currently are hindered by the pervasive fear of Federal liability under the Federal Superfund statute, even in States where a site has been cleaned up to the satisfaction of the State regulatory agency.

We believe, as does the National Governors Association and The Environmental Council of States, that the House majority draft effectively addresses this barrier by shielding a party from additional cleanup action by the Federal Government when such party investigates and remediates a brownfield under a State brownfield program that meets the criteria of the EPA, except in those very limited circumstances that are spelled out in your bill.

So we believe that those are reasonable conditions, and we believe that the House majority draft's treatment of the finality issue provides the kind of certainty that is needed to encourage more parties to clean up contaminated sites across this country.

Second, the House majority draft would require the Governor's concurrence prior to listing a site on the Federal Superfund list, which is very important to New York State, since it demonstrates a deference to the actions being taken under the state's programs. And it recognizes that a majority of our sites are actually cleaned up by the—at the State or local level.

In New York, EPA's Region 2 office does not place a site on the NPL without the concurrence of Governor Pataki. This has worked out very well. It fosters an excellent working relationship, and we think it actually should be codified in law.

And, third, the House majority draft provides another important tool and that is funding. I commend your effort and strongly urge you to make the States a full partner in this effort by authorizing States like New York that demonstrate that they have programs and policies and procedures in place to actually administer the grant and loan programs, so the States actually become the administrator of the funds instead of EPA.

We have a proven track record, many of us, with the clean water and the drinking water State revolving loan funds, and we think that that should be used as a model.

So with that, my time is up. Governor Pataki and I appreciate your leadership and your consideration of our views on this ex-

tremely important Federal initiative, and we are looking forward to working with you.

[The prepared statement of Erin M. Crotty follows:]

PREPARED STATEMENT OF ERIN M. CROTTY, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Chairman Gillmor, thank you for providing me with the opportunity to testify at this morning's hearing. I appreciate the opportunity to share with you the position of the State of New York on an issue that is so important to public health and environmental protection and the economic and social well-being of our citizens. I am also fortunate to have an opportunity to meet again with two New Yorkers who have made crafting effective brownfield programs a priority—Congressman Fossella and Congressman Towns—and New Yorkers are fortunate to have them representing our interests.

Chairman Gillmor, Governor Pataki has asked me to relay to you the State of New York's strong support for Congressional action that will make it easier for states, local governments, and private entities to investigate, remediate and redevelop brownfields that are, unfortunately, blights on our urban and rural landscapes. Under Governor Pataki's leadership, New York has become a leader in the field of brownfield cleanup and redevelopment. This morning, I would like to share with you some of the progress that we already have made to remediate brownfields, and the need which we have found, based upon this experience, for Congressional legislation.

Creativity and innovation at the State level has been the hallmark of cleaning up and redeveloping many brownfields. However, even with this significant progress, there are many more sites in New York and thousands more across this nation that are still in need of investigation, cleanup and redevelopment. We think the federal government can help remove some of the barriers to their redevelopment.

New York's Brownfields & Voluntary Cleanups Programs

New York's Brownfields and Voluntary Cleanup Programs join our traditional efforts, the State Superfund and the Oil Spill Programs, that were put in place to clean up sites which were contaminated by hazardous wastes or petroleum products. The New York State Superfund, first enacted in 1979, provides for the investigation and cleanup of sites that pose a significant threat to public health and the environment from hazardous waste contamination. The State has remediated 417 sites through this program, and an additional 400 more cleanups are underway. Our Oil Spill Program provides for an immediate and long-term response to petroleum and chemical spills. On average, approximately 7,000 oil spill response and cleanup actions are conducted annually. These two programs have been very successful and their implementation has provided the State with extensive knowledge and experience relative to contaminated site cleanups.

In an effort to transform brownfields from liabilities to assets for New Yorkers, in 1996 Governor Pataki proposed and championed the Clean Water/Clean Air Bond Act which authorizes \$200 million for the investigation and cleanup of brownfields by municipalities. New York's Brownfields Program is one of the most heavily funded of its kind in the nation. The Program provides financial assistance to municipalities for up to 75 percent of eligible costs. Significantly, New York State provides unprecedented liability limitation benefits to a municipality, its successors in title, lessees, and lenders that participate in the Brownfields Program. Our Brownfields Program provides the tools necessary for municipalities to work in partnership with their communities, the State and the private sector to turn properties that were once unused into thriving, vibrant contributions to the community.

To date, 96 investigation projects and 14 cleanup projects have been approved. These projects have received a total of \$24 million. Governor Pataki has proposed legislation that is currently before the New York State Legislature that would increase this grant level from 75 percent to 90 percent, and allow the use of other State or federal assistance for the required 10 percent local match. The Governor's proposal has widespread support from stakeholders, including the State's mayors, towns and counties and it is our hope that the Legislature will enact the legislation this legislative session. These changes will enable municipalities to utilize the funding provided by the House Majority draft for their cost-share thereby achieving a true federal, state, and local partnership to addressing brownfields and further leveraging our public resources.

In addition to the Brownfields Program that provides incentives for municipalities to cleanup contaminated properties, the State also has developed a successful Voluntary Cleanup Program to encourage the private sector to investigate, cleanup and

redevelop brownfields. The Voluntary Cleanup Program uses private rather than public funds, and also is intended to reduce the development pressures on “greenfield” sites. New York’s Voluntary Cleanup Program provides a cooperative approach among the New York State Department of Environmental Conservation, lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use. When the volunteer completes the required work, the Department provides a release from liability for the work done and the contaminants addressed, with standard reservations.

To date, the New York State Department of Environmental Conservation has signed 196 agreements with volunteers, addressing a total of 255 cleanup projects. Of these projects, 86 are ongoing or completed investigations, and 115 represent remediations—50 of which already have been completed. Each of these cleanups represents a new beginning for a formerly contaminated under-utilized site—from providing new jobs to the development of new parks for New Yorkers to enjoy.

The Need for Congressional Action

As federal and state policy makers we need to level the playing field between greenfield development and brownfield redevelopment. We need to make certain that our statutes and our programs are not creating artificial barriers to the reuse of brownfields, and if they are creating barriers, we need to take appropriate action. As we create programs and policies to revitalize our urban areas, we need to make certain that programs to investigate, cleanup and redevelop brownfields are the very foundation of those initiatives. In many areas, without an effective brownfield strategy our attempts to revitalize our urban areas will be lost.

Through New York’s over 20 years of experience in cleaning up contaminated properties, we have been able to identify the barriers to effective cleanups and the appropriate incentives to encourage the investigation, clean up, and redevelopment of these sites. Many of the barriers to brownfield redevelopment require statutory amendment at the federal and state levels. The existing liability scheme, which holds all past, present and future owners of contaminated property liable for cleanup costs, regardless of when or how the property was acquired relative to the contamination, is a barrier to developers to purchase brownfields and municipalities to take title to abandoned property. So, too, does the potential cost of cleanup, which may not be known at the time of purchase. In addition, lenders are often reluctant to extend credit for the purchase and cleanup of brownfield sites, fearing future liability or diminution of the value of the property held as collateral should the site prove to require more extensive and costly cleanup than initially thought. Consequently, financing such a purchase may be more difficult than financing a purchase of a greenfield site.

Based upon our extensive experience over the past 20 years, the most important need for federal legislation is to provide liability relief to those not responsible for the contamination and finality to the cleanup process. Looked at from that perspective, all three of the primary bills before Congress—S. 350, the bill which passed the Senate, and which forms the basis for both of the draft proposals in the House: the House Majority bill draft; and the House Minority bill draft—address these issues to differing degrees. The State of New York believes, however, that of these three bills the House Majority draft would provide the greatest benefit to municipalities and non-responsible parties that volunteer to clean up sites. Further, we believe that the passage of brownfields legislation should be a priority for this Congress, but it must be legislation that encourages the actual cleanup of brownfields.

House Majority Draft

The House Majority’s draft legislation is favored by New York State for three primary reasons: it provides a mechanism for finality, requires gubernatorial concurrence for listing a site on the National Priority List, and provides much needed funding for the investigation and cleanup of brownfields. I will address these points briefly below.

First, the House Majority draft expands and enhances the finality language included in S. 350 which is vital to improving the effectiveness and pace of brownfield cleanups. There is no question that brownfield redevelopments currently are hindered by the pervasive fear of federal liability under the Superfund statute even in instances where a site has been remediated to the satisfaction of the state. What the State of New York, as well as the National Governors Association and the Environmental Council of the States, strongly recommends is language that at brownfield sites, the burden should be on USEPA to show that the Governor was notified and given a reasonable opportunity to correct the problem, or threat of the problem, and was unwilling or unable to take appropriate action. Of course, if USEPA needed to take emergency action to protect public health or the environ-

ment, and the state was unwilling to respond, intervention by the federal government might be appropriate. Similarly, a state could ask for federal assistance in cleaning up any site if the circumstances warrant it.

The House Majority draft effectively addresses this barrier by shielding a party from additional cleanup action by the federal government when such party investigates and remediates a brownfield under a state brownfield program that meets the USEPA's criteria; except in very limited circumstances. We think that the finality provisions of your discussion draft are a fair compromise between the various points of view and sufficiently narrowly outline the circumstances where intervention from USEPA is justifiable. In addition to the state-request, and state-line or federal property migration exceptions, your draft bars Superfund liability unless USEPA determines not only that a release or threatened release presents an "imminent and substantial endangerment" to public health or welfare, but also that an emergency situation exists, and that the State will not quickly respond. Your draft also provides a reasonable 72-hour period of time for a state to reply to USEPA of the action it intends to take, while maintaining an option for USEPA to take immediate action if necessary. These are reasonable conditions, and we believe that the House Majority draft's treatment of the finality issue provides the certainty needed to encourage more parties to cleanup brownfield properties across this country.

We respectfully request, however, that the House consider including a provision that will further address the finality issue. The legislation should prevent the federal government from recovering its past response costs at sites remediated under a state brownfield program when the party conducting the cleanup is not the party responsible for the contamination. Such a provision was included in H.R.1750 of the 106th Congress introduced by Congressman Towns. To not give this assurance to developers who are spending thousands, or hundreds of thousands, of dollars to cleanup and redevelop brownfields reduces the chances that such redevelopments will happen—the exact opposite of what is intended by the legislation.

Second, the House Majority draft would require the Governor's concurrence prior to listing a site on the National Priorities List (NPL). This requirement is important to New York State, since it demonstrates a deference to the actions being taken under the State's remedial programs. It recognizes that the majority of the activities to remediate brownfields will be undertaken at the State or local level. The right of concurrence on new NPL listings ensures that states have the right of first action at contaminated sites, and where a state is proceeding with cleanup, or has plans to do so, the federal government will defer. As states are closer to the sites and to the affected communities, such deference is entirely appropriate. This right of concurrence applies only to long-term cleanup and does not in any way limit USEPA's authority to respond to immediate problems. Nor does it in any way impede USEPA's ability to take action at the hundreds of sites that are already listed on the NPL.

Placement of new sites on the NPL without the concurrence of the Governor when a state is prepared to apply its own authority would not only be wasteful of federal resources, it would be counterproductive, resulting in increased delays and greater costs. Over the years, USEPA has recognized that states are currently overseeing most cleanups, and has, as a discretionary matter, sought gubernatorial concurrence before listing a site. In New York State, USEPA's Region 2 office does not place sites on the NPL unless the State formally requests that a site be listed. This process works well, fosters an excellent working relationship between USEPA and the State, and allows for predictability as to what will be placed on the NPL. Therefore, New York recommends having this informal policy codified in law to assure that it continues throughout future administrations. We greatly appreciate the inclusion of a provision in the House Majority draft requiring gubernatorial concurrence before a site is listed on the National Priorities List, except in limited situations.

Third, the House Majority draft provides another important tool to the cleanup and redevelopment of brownfields: funding. I commend your effort and strongly urge you to make the states a full partner in this effort by authorizing states, like New York, that demonstrate that they have programs, policies and procedures in place to administer brownfield grant and loan programs, to manage this effort on behalf of the federal government.

States such as New York, with sophisticated environmental restoration management programs, should receive preferential funding under a Congressional brownfields bill. State population levels also should be a major criteria for the distribution of the funds, consistent with other federal programs. In addition, we recommend that the bill include provisions that USEPA will provide funding through existing state programs rather than directly to municipalities. Through implementation of these recommendations, New York believes that the federal funds will be used in the most cost-effective and efficient manner.

This proposed funding structure parallels many existing environmental and public health protection programs and provides for an effective federal-state-local partnership. The existing Clean Water and Drinking Water State Revolving Funds, for example, are excellent examples of these beneficial partnerships. In addition, through such efforts as the Clean Water/Clean Air Bond Act and the Voluntary Cleanup Program, New York State already has an excellent understanding of the investigation and cleanup process which municipalities and others are undertaking. Federal legislation should take advantage of this existing base of knowledge.

We also concur with the position of the House Majority draft regarding the necessity of dispensing with National Contingency Plan (NCP) compliance. While the House Majority draft clearly states that NCP compliance is not required, other legislative proposals have qualified NCP compliance in such a way as to make its applicability less certain. In doing so, this language would have the effect of discouraging participation in brownfields programs. New York's experience indicates that we can reach our objective of making brownfields cleanups protective of public health and the environment without requiring adherence to the NCP.

Finally, I urge you to avoid language which would require a state or local government to conduct an inventory of brownfields sites in order to receive a brownfields grant or loan. In New York, we have found that communities are reluctant to identify individual properties as contaminated or potentially contaminated. Such an identification can create a stigma which negatively affects the property from an economic and community perspective.

Governor Pataki and I appreciate your consideration of our views on this extremely important federal initiative. We commend you for your efforts and recognize the need for such a measure. The creation of this federal, state, and local partnership is crucial to return brownfields to productive use and improve the quality of life for our citizens.

Mr. GILLMOR. Thank you very much.

I also wanted to mention that Congressman Fossella from New York who is a member of this panel was hoping to be here to introduce you to the panel.

And, Commissioner Gonzales, the same is true of Congresswoman Wilson. But she was also detained on the floor, so on their behalf I will give you a special welcome.

But go ahead, Commissioner.

STATEMENT OF HON. JAVIER GONZALES

Mr. GONZALES. Thank you, Mr. Chairman. Chairman Gillmor, Mr. Pallone, and members of the committee, thank you for inviting me to testify on an issue of great importance to America's counties and to citizens all across this country—the cleanup and revitalization of brownfields.

My name is Javier Gonzales, and I am a County Commissioner from Santa Fe County, New Mexico, and I currently serve as President-elect of the National Association of Counties. Accompanying me is Larry Naake, the Executive Director of NACO; Edwin Rosado, our Legislative Director; and Stephanie Osborn, our Associate Legislative Director for Environmental Issues.

Mr. Chairman, studies have estimated that there are hundreds of thousands of brownfield sites—sites containing low-level environmental contamination—in the United States. They are in suburban and rural America, as well as in our inner cities. The cleanup and revitalization of these sites presents a win-win scenario for States, counties, citizens, and cities.

With the right tools, we can improve the health of our environment while creating opportunities for economic development as well as for parks, green space, and housing. By restoring brownfield sites to productive use, we can address two major priorities of the Nation's counties. First, we facilitate local smart growth

planning by providing space for in-fill development instead of pushing new development to greenfields.

Second, we help address the Nation's affordable housing crisis by clearing the way for cost-effective residential development in areas with existing infrastructure. For these reasons, NACO strongly supports the enactment of bipartisan brownfields legislation in as speedy a manner as possible.

In past years we have urged the Congress to pass brownfields legislation only if it also contained a provision to codify the EPA's municipal settlement policy under Superfund. We still believe legislation to address municipal liability is needed. However, we now believe the time has come to enact stand-alone brownfields legislation in a timely manner while Congress continues to grapple with Superfund reforms.

With regard to the three bills before us today, first let me say that each of them has tremendous merit. From the perspective of a county official, the bills have much more in common than they have differences.

In particular, NACO supports the 5-year, \$200 million annual authorization for brownfields grants to counties and other local governments contained in all three bills, as well as the provision to extend eligibility for 25 percent of those funds to sites contaminated by petroleum. Adequate funding for these programs is of paramount importance to NACO.

NACO offered its support for S. 350 as the bill was being considered by the Senate earlier this year. Though we are encouraging the House to work its own will on brownfields, we believe the Senate bill contains the major elements needed in brownfields legislation. And we continue to recognize the careful bipartisan balance struck in the Senate's passage of the bill.

Therefore, we are pleased that both the Gillmor discussion draft, the Democratic discussion draft, have used S. 350 as the foundation for a House brownfields bill.

With regard to the Gillmor discussion draft, NACO has identified three areas that we believe represent improvements to S. 350. The first is the draft bill's approach to eligibility. NACO supports a flexible program that extends brownfields eligibility to portions of larger sites at which environmental response action is required, so long as a portion of the site eligible is not the subject of the response action.

Second, NACO endorses the notion of further devolving the authority and responsibility to oversee the cleanup of brownfield sites to States and local governments—a concept contained in each of the three bills. We support the State finality provisions contained in this draft bill which outline the narrow circumstances where the Federal safety net may be necessary and EPA should intervene.

Finally, NACO supports procedural streamlining of the permitting process for the cleanup of brownfield sites. Simplifying the permitting process would provide for more timely and cost-effective cleanups while not affecting compliance with the substantive environmental requirements contained in the current law.

With regard to the Democratic discussion draft, we support the following revisions to S. 350. First, we support the addition of brownfields worker training and safety program authorized at \$20

million annually. And, second, we support the inclusion of general minimum criteria that a State program must meet before Federal enforcement authority is restricted under the bill's finality provisions. These assurances help balance the authority devolved to the States under this legislation.

In summary, Mr. Chairman, we commend the authors of all three bills being examined at today's hearing. Each of them is built from the same strong foundation and each has merit. Again, we are encouraged by the Senate's bipartisan effort in support of S. 350.

NACO supports similar bipartisan efforts in attaining House passage, a smooth conference with the Senate, and a final bill that can be signed by the President. We want to work with the Republicans and the Democrats in this effort.

Mr. Chairman, Mr. Pallone, on behalf of the National Association of Counties, I thank you for your leadership on this important issue and for inviting testimony from county government perspective.

Thank you.

[The prepared statement of Hon. Javier Gonzales follows:]

PREPARED STATEMENT OF HON. JAVIER GONZALES, COMMISSIONER, SANTA FE COUNTY, NEW MEXICO AND PRESIDENT-ELECT, NATIONAL ASSOCIATION OF COUNTIES

Chairman Gillmor, Mr. Pallone and members of the committee, thank you for inviting me to testify on an issue of great importance to counties across the country—the cleanup and revitalization of brownfields.

My name is Javier Gonzales, and I am a County Commissioner from Santa Fe County, New Mexico. I currently serve as President-Elect of the National Association of Counties.

The National Association of Counties (NACo) is the only national organization representing counties in the United States. Our membership is comprised of counties large and small, urban, suburban and rural. County governments have the day-to-day responsibility for local land-use planning, environmental protection, economic growth and stability, and the general health and welfare of the citizens in our communities.

Studies have estimated that there are hundreds of thousands of brownfields sites—sites containing low-level environmental contamination—in the United States. They are in suburban and rural America, as well as in our inner cities. The cleanup and revitalization of these sites presents a win-win scenario for states, counties, cities, and our citizens. With the right tools, we can improve the health of our environment while creating opportunities for new economic development, as well as for parks and green space.

By restoring brownfields sites to productive use, brownfields cleanup and revitalization helps address two major priorities of the nation's counties. First, it facilitates the implementation of local smart growth plans by providing space for infill development, instead of pushing new development to outer-lying, previously undeveloped areas (green fields). And in rural areas, such as parts of my home county of Santa Fe, directing development to these sites enables us to better protect agricultural lands and the character of small town America.

Second, brownfields revitalization addresses a county priority by creating opportunities for housing development. NACo believes that this country is facing an affordable housing crisis, and that the redevelopment of these sites can help clear the way for cost-effective residential development in areas with existing infrastructure.

For these reasons, NACo strongly supports the enactment of responsible, effective and bipartisan brownfields legislation, in as speedy a manner as possible.

Two weeks ago, NACo's Large Urban County Caucus, representing America's 100 largest counties, with over 48 percent of the U.S. population, conducted a legislative fly-in in which affordable housing and the need for brownfields legislation were the major topics of discussion with Congressional leadership in the House and Senate.

In past years, as you may remember, we have urged the Congress to pass brownfields legislation only if it also contained a provision to codify the Environmental Protection Agency's Municipal Settlement Policy under Superfund. Although that legislative strategy has not succeeded, we still believe legislation to address municipal liability under Superfund is needed. However, we now believe the time

has come to enact stand-alone brownfields legislation in a timely manner, while Congress continues to grapple with Superfund reforms.

In that light, I wish to thank the members of this committee for placing such a high priority on brownfields legislation. NACo believes that federal brownfields legislation is needed to:

- Shore up and refine the successful U.S. EPA brownfields characterization, assessment and remediation grants program;
- Extend eligibility to sites contaminated by petroleum or petroleum byproducts; and
- Further devolve the authority to oversee brownfields cleanups to the state and local level.

With regard to the three bills before us today—the Senate-passed bill (S. 350), the Gillmor discussion draft of June 13, and the Democratic discussion draft of June 20—first let me say that each of them has tremendous merit and, from the perspective of a county official, the bills certainly have more in common than they have differences.

In particular, NACo supports the five-year, \$200 million annual authorization for brownfields characterization, assessment and remediation grants to counties and other local governments contained in all three bills, as well as the provisions to extend eligibility for 25 percent of those funds to sites contaminated by petroleum or petroleum products. This type of assistance has proven to jump-start the cleanup and revitalization of brownfields sites counties in across the country. Adequate funding for these grant programs is of paramount importance to NACo.

NACo also supports the liability clarifications for contiguous properties, prospective purchasers and innocent landowners contained in each bill. These provisions help remove the chilling effect that currently serves as a disincentive to revitalize brownfields sites.

With regard to S. 350:

NACo offered its support for S. 350 as it was being considered by the Senate earlier this year. Though we are encouraging the House to work its own will on brownfields legislation and to consider adjustments to S. 350, we believe the bill contains the major elements needed in brownfields legislation. And we continue to recognize the careful, bipartisan balance struck in the Senate's passage of the bill. Therefore, we are pleased that both the Gillmor discussion draft and Democratic discussion draft have used S. 350 as the foundation for a House brownfields bill.

With regard to the Gillmor discussion draft, NACo identified three areas that we believe represent improvements to S. 350:

- The first is the draft bill's approach to brownfields eligibility exclusions. NACo supports a flexible program that extends brownfields eligibility to portions of sites at which Superfund, RCRA or other environmental response action is required, so long as the portion of the site eligible for brownfields assistance is not the subject of such requirements. We believe that lesser contaminated portions of these sites should not unilaterally be excluded from eligibility, and that decisions to provide brownfields assistance at these sites should be made on a case-by-case basis.
- Second, NACo endorses the notion of further devolving the authority and responsibility to oversee the cleanup and revitalization of brownfield sites to states and local governments—a concept contained in each of the three bills. We support the state finality provisions contained in this draft bill, which outline the narrow circumstances where the federal safety net may be necessary and EPA should intervene; that is, when circumstances at the site “present an imminent and substantial endangerment to public health, welfare or the environment” and “the State will not take the necessary response actions in a timely manner.” Under such circumstances, NACo supports providing the EPA Administrator with the authority to take immediate action, as outlined in the bill.
- Finally, NACo supports procedural streamlining of the permitting process for the cleanup of brownfields sites. Simplifying the permitting process would provide for more timely and cost-effective cleanups, while not affecting compliance with the substantive requirements contained in current law. We support the approach of requiring the EPA Administrator to promulgate such a regulation, and would look forward to working with the Administrator during the rule-making process.

With regard to the Democratic discussion draft, we support the following revisions to S. 350:

- First, we support the addition of a brownfields worker training and safety program authorized at \$20 million annually. As proposed, the program would be used to support important programs to train and educate workers directly en-

- gaged in brownfields cleanup and redevelopment, including those conducting hazardous waste cleanups, as well as local government officials and the public.
- Second, we support the inclusion of general minimum criteria that a state response program must meet before federal enforcement authority is restricted under the bill's finality provisions, such as are used in negotiating current Memoranda of Agreement between EPA and the states. Such assurances would help balance the authority devolved to the states under this legislation, and we have supported these provisions in previous brownfields bills. (We also support conditioning grants to the states on minimum criteria, as included in S. 350.)

In summary, we commend the authors of all three bills being examined at today's hearing. Each of them is built from the same strong foundation, and each has merit.

Again, we are extremely encouraged by the Senate's bipartisan effort in support of S. 350. NACo supports similar bipartisan efforts in seeking agreements from both sides of the aisle in attaining House passage, a smooth conference with the Senate and a final bill that can be signed by the President. We want to work with Republicans and Democrats in this effort.

Mr. Chairman, Mr. Pallone, on behalf of the National Association of Counties, I thank you for your leadership on this issue, and for inviting testimony from the county government perspective. I would be pleased to answer any questions you may have.

Mr. GILLMOR. Thank you, Commissioner.

I will now recognize Mr. Pallone of New Jersey to introduce the Mayor from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. And let me say that Mayor Chris Bollwage is the Mayor of Elizabeth, New Jersey, and Elizabeth may be one of the best examples of a major city in our State that has made great strides in terms of redevelopment, not only its residential but its commercial districts.

And Mayor Bollwage has, in particular, played a major role, had to deal with a lot of brownfield sites which I think has been—his success in that has been a major part of the redevelopment effort in Elizabeth, and he really is looked at around the State as sort of a model for a larger city mayor in New Jersey who can accomplish a great deal with redevelopment, at the same time taking concerns of the environment at heart.

So thank you for being here, Chris.

STATEMENT OF HON. J. CHRISTIAN BOLLWAGE

Mr. BOLLWAGE. Thank you, Congressman. Don't tell the two mayors that are running for Governor that statement.

Mr. PALLONE. I know. I was thinking of that today.

Mr. BOLLWAGE. Good morning, Mr. Chairman and members of the subcommittee. I am Chris Bollwage, the Mayor of Elizabeth, and I am pleased to testify today on behalf of The United States Conference of Mayors, the national mayors organization representing more than 1,000 cities with a population of 30,000 or more. I currently serve as an Advisory Board member as well as the co-chair of the Brownfields Task Force.

Mr. Chairman, ranking member Pallone, I would like to begin my comments by commending you and members of this subcommittee for moving forward with brownfields legislation. The enactment of bipartisan brownfields legislation has been among our conference's top priorities for 7 years. And I would like to deliver one message on behalf of the Nation's mayors—that we need prompt, bipartisan action on brownfields legislation.

While we can engage in discussion about how to craft specific provisions of the legislation, debate both substantive and technical

changes, the overriding issue is, how do we come to a broad bipartisan agreement on this legislation?

The Nation's mayors urge all of you to craft a bipartisan agreement on brownfields. This has been, and continues to be, the central tenet of the conference's policy on brownfields legislation. And just for the record, at no time, Mr. Chairman, has the Conference of Mayors endorsed or supported a partisan legislative proposal on these matters.

I was pleased this past weekend to cosponsor a policy statement with Charlotte Mayor Patrick McCrory, the Chair of the Conference's Energy and Environment Committee, and Green Bay Mayor Paul Jadin, in a bipartisan group of mayors calling for bipartisan congressional action.

The message of this policy statement is bipartisanship. The mayors call upon the House leadership of both parties to come together to craft a bipartisan agreement and to do so promptly. The mayors have called upon President Bush in Detroit to request the House leaders to seek some bipartisan action, and we urge the House of Representatives to adopt Senate-passed legislation S. 350 if ongoing House efforts fail to develop a timely and broad bipartisan agreement on brownfields legislation.

Our position provides you with the opportunity to work cooperatively in crafting a bipartisan agreement. Failing to generate such an agreement in a timely manner, the mayors would then urge you simply move forward and pass Senate legislation S. 350.

Close behind the funding is the need for liability relief for innocent parties. Again, each of the pending bills before you have provisions that protect innocent parties, focusing on developers and other parties who are seeking to clean up and redevelop these sites.

In addition, there are other parties like contiguous landowners that are given protection under the legislation before you. We must ensure that people who get protection under these provisions are innocent parties.

In this Congress, the decision has been made, and rightly so, to move a brownfields only bill—a position strongly advanced by President Bush and our former Governor, Christine Todd Whitman, in their support of S. 350. It appears now that there are some efforts to use brownfield legislation as an umbrella to extend brownfield-related provisions to sites which are not truly brownfields.

And, Mr. Chairman, as Congressman Pallone said, we have developed brownfields in the city of Elizabeth, a former landfill that is now a 166-acre site that has a 1.2 million square foot mall, three hotels, a movie theater opening in the summer, plus 750,000 square feet of office space. I welcome anyone on the committee to get more information on that. I can provide it to Congressman Pallone.

Mr. Chairman, on each of these issues, my statement addresses funding, liability, finality, and definitional issues with the full text for the record. It is clear that the Senate has found ways to reach broad agreements on these issues. In fact, on the issue of finality as one example, they rightly concluded that their agreement, while short of what some might advocate, will positively affect an over-

whelming percentage of the many brownfield sites throughout the Nation.

As such, the finality provisions in the Senate were broadly supported. EPA Administrator Whitman, a former Governor, agrees with the Senate approach. I was there when she testified. We also agree with the Senate's stance on these issues.

We urge this panel to work in the same spirit as the Senate, work to reach similar, broad, bipartisan agreements to allow this legislation to move forward. The technical nuances of one provision over another will matter little at the end of the day if you cannot reach a bipartisan agreement.

Earlier this week our conference leaders met with President Bush to talk about our priority issues before he spoke to the full conference membership on face-based initiatives in Detroit. We underscored the need for a bipartisan agreement in the House, praising him for the support of the Senate bill. He indicated that enactment of brownfields legislation is among his priorities and noted his support of the Senate's bipartisan legislation.

We need this body to move forward on a bipartisan basis, so that we can accelerate our efforts to address this critical national problem.

Mr. Chairman, and members of the subcommittee, ranking member Pallone, you can count on the Nation's mayors for strong support. Thank you very much for this opportunity, Mr. Chairman, and it is good to see you, Congressman Pallone.

[The prepared statement of Hon. J. Christian Bollwage follows:]

PREPARED STATEMENT OF HON. J. CHRISTIAN BOLLWAGE, MAYOR, ELIZABETH, NJ ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS

Good morning, Mr. Chairman and Members of the Subcommittee, I am J. Christian Bollwage, Mayor of Elizabeth, New Jersey.

I am pleased to testify today on behalf of The United States Conference of Mayors, the national mayors' organization representing more than 1,000 cities with a population of 30,000 or more.

Today I will speak to the position of the Conference of Mayors regarding the pending brownfield proposals—Chairman's Discussion Draft, Democratic Discussion Draft and S. 350, the Senate-passed bill—now before this Subcommittee.

Within the Conference, I am a Member of the Advisory Board and I also serve as a Co-chair of the organization's Brownfields Task Force, a position I have held since that panel was first established in 1996. Given these positions, I have been extensively involved in these issues for some time.

Mr. Chairman and Ranking Minority Member Pallone, I would like to begin my comments by commending you and Members of this Subcommittee for moving forward with brownfields legislation. The enactment of bipartisan brownfields legislation has been among the Conference's top priorities for several years. In fact, this is now our third Congress where we have been urging bipartisan Congressional action on this legislation.

Mr. Chairman, I want to deliver one message on behalf of the nation's mayors and this is: we need prompt bipartisan action on brownfields legislation. While we can engage in discussion about how to craft specific provisions of the legislation, and debate both substantive and technical changes, the overriding issue is how we come to a broad bipartisan agreement on this legislation.

Need for Bipartisan Action on Brownfields

Mr. Chairman, the nation's mayors urge you to craft a bipartisan agreement on brownfields. This has been and continues to be the central tenet of the Conference's policy on brownfield legislation. At no time, Mr. Chairman, has the Conference of Mayors endorsed or supported a partisan legislative proposal on these matters.

Earlier this week, the Membership of the Conference of Mayors renewed its call for a broad bipartisan agreement on brownfields legislation. Mr. Chairman and Members of this Subcommittee, I call you attention to the policy statement, *Bipar-*

tisan Action on Brownfields Legislation, which was adopted Monday, June 25 by our Membership during our 69th Annual Meeting in Detroit.

I was pleased to sponsor this policy statement with Charlotte Mayor Patrick McCrory, the Chair of the Conference's Energy and Environment Committee, and Green Bay Mayor Paul Jadin. It is a bipartisan group of mayors, calling for bipartisan Congressional action.

The message of this policy statement is bipartisanship. In this statement, the mayors call upon the House Leadership of both parties to come together to "craft a bipartisan agreement and to do so promptly." The mayors also call upon President Bush "to request House Leaders to seek prompt bipartisan action." Finally, the mayors urge the House of Representatives to "adopt the Senate-passed legislation (S. 350), if ongoing House efforts fail to develop a timely and broad bipartisan agreement on brownfields legislation."

Our position provides you with the opportunity to work cooperatively in crafting a bipartisan agreement. Failing to generate such an agreement in a timely manner, the mayors would urge you to simply move forward with the Senate-passed legislation, S. 350.

Elements of an Agreement

Mr. Chairman, the proposals before you today share some common elements that the mayors have consistently supported. We have called for resources at the local level to support city and county programs to assess and cleanup these sites. The pending bills before you have funding elements in them that are generally consistent.

In our survey work at the Conference, where we conduct annual surveys of our membership, federal funding for these local efforts was the top need that was identified in each of three surveys of cities. This information simply underscores the importance of a strong funding element in this legislation.

Close behind funding is the need for liability relief for innocent parties. Again, each of the pending bills before you have provisions that protect innocent parties, focusing on developers and other parties who are seeking to cleanup and redevelop these sites. In addition, there are other parties like contiguous landowners that are given protection under the legislation before you. We must ensure that people who get protection under these provisions are "innocent parties."

We have also called for more clarity on the relationship between the federal government and the states on brownfield cleanups and other matters. As you know, this element is generally defined by the debate over what is called "finality."

These issues—funding, liability relief and the federal/state relationship—constitute the core elements of a brownfield package.

These three elements need to be supported by a clear and appropriate definition of what constitutes a brownfield. This is an area that needs particular attention in the final House version of the legislation to ensure that the sites that are the focus of the legislation, be it liability protection, funding or priority under state cleanup programs, are truly brownfield sites.

In this Congress, the decision has been made, and rightly so, to move a brownfields only bill, a position strongly advanced by President Bush and Governor Christine Todd Whitman in their support of S. 350.

It appears now there are some efforts to use brownfield legislation as an umbrella to extend brownfield-related provisions to sites, which are not truly brownfields. Here I am talking about more seriously contaminated sites, usually characterized as NPL or NPL-caliber sites. We would urge you to abandon provisions that characterize sites as brownfields, particularly where there are current owners/operators who are responsible for contamination at these sites, so they can realize relief or other protections/considerations for contamination that they caused. This is a direction we would oppose.

Mr. Chairman, on each of the issues that I have outlined—funding, liability, finality and definitional issues—it is clear that the Senate found ways to reach broad agreements on these issues. In fact, on the issue of "finality", as one example, they rightly concluded that their agreement, while short of what some might advocate, will positively affect an overwhelming percentage of the many brownfield sites throughout the nation. As such, the finality provisions in the Senate were broadly supported. EPA Administrator Christine Todd Whitman, a former Governor, agrees with the Senate approach. We also agree with the Senate's stance on these issues.

We urge this panel to work in the same spirit as the Senate and work to reach similar broad bipartisan agreements to allow this legislation to move forward. The technical nuances of one provision over another will matter little, at the end of the day, if you can't reach a bipartisan agreement.

Concluding Remarks

Mr. Chairman, I want to underscore the call of the nation's mayors for bipartisan action on brownfields legislation. Bipartisan action is a formula that works.

Earlier this week, our Conference leaders met with President Bush to talk about our priority issues before he spoke to the full Conference Membership on faith-based initiatives. We underscored the need for a bipartisan agreement in the House, praising him for his support of the Senate bill. He indicated that enactment of brownfields legislation is among his priorities and noted his support of the Senate's bipartisan legislation.

Let me recap. President Bush has made enactment of brownfields legislation a priority. The United States Senate has voted 99-0 on its proposal, S. 350. We need this body to move forward on a bipartisan basis so that we can accelerate our efforts to address this critical national problem.

To this end, Mr. Chairman and Members of this Subcommittee, you can count on the strong support of the nation's mayors.

Mr. GILLMOR. Thank you, Mayor.
Delegate Billings?

STATEMENT OF HON. LEON G. BILLINGS

Mr. BILLINGS. Thank you, Mr. Chairman, Representative Pallone. I am Maryland's State Delegate, Leon Billings. I appear before you today on behalf of the National Conference of State Legislatures, where I currently serve as Vice Chairman of the Environment Committee.

Enactment of brownfields legislation in the 107th Congress is a top priority for NCSL. NCSL has in its last formal meeting adopted a separate resolution on brownfields. It is a resolution which, as you know, Mr. Chairman, it is difficult to get a resolution through NCSL. This resolution was adopted unanimously. And interestingly enough, it parallels very closely the position taken by the administration witness this morning.

The following objectives are outlined in that resolution. I will briefly review them. One, define brownfields so as to separate them from those Superfund site or sites with sufficient contamination to be concerned about potential future offsite impacts or potential future use.

Two, allow States to determine whether or not a site is a brownfield against a Federal statutory definition. And if a State determines that a brownfield site is free of contamination or can be cleaned up enough for the designated deed-restricted use, a State should be authorized to immunize a developer from liability or future cleanup responsibility.

The prepared State action should immunize parties from any liability for contamination that they did not contribute to or cause. Retain States' primary responsibility for brownfields redevelopment program, grandfather existing State voluntary cleanup programs and memorandums of agreement, and increase Federal funding for assessment and cleanup of brownfield sites.

Let me emphasize, Mr. Chairman, brownfields legislation should be free-standing and relate only to the narrow purpose of allowing States to redevelop abandoned, underutilized, industrial and commercial property for which there is minimum likelihood of offsite contamination or endangerment to health and welfare of subsequent users. And it should not be used as a means to achieve other Superfund-related agendas.

I will stop at that point. I have a complete statement. I would like to make one observation. There has been much discussion about funding. Speaking only as a delegate from the State of Maryland, Mr. Chairman, the issue of finality is the issue with which we are dealing in our State. If we cannot immunize our developers from Federal liability action, we are not going to have a brownfields program.

Funding is secondary. While we would like to have the money, thank you, give us finality and we will worry about the money ourselves—speaking, again, only for Maryland.

[The prepared statement of Hon. Leon G. Billings follows:]

PREPARED STATEMENT OF HON. LEON G. BILLINGS, DELEGATE, MARYLAND GENERAL ASSEMBLY, VICE CHAIR, NCSL ENVIRONMENT COMMITTEE ON BEHALF OF NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman, members of the committee, I am Maryland State Delegate Leon Billings. I appear before you today on behalf of the National Conference of State Legislatures (NCSL). I currently serve as a Vice Chair of NCSL's Environment Committee of the Assembly on Federal Issues.

NCSL is a bipartisan organization representing all state legislators from all 50 states and our nation's commonwealths, territories, possessions and the District of Columbia. The focus of NCSL's policies and advocacy activity is the development and maintenance of workable state-federal partnerships, preservation of state authority, protection against costly unfunded mandates and the promotion of fiscal integrity. I appreciate the invitation to speak to you today about the brownfields proposals before the 107th Congress.

Let me start by voicing NCSL's support for the enactment of brownfields legislation in the 107th Congress. It is a top priority for NCSL. Several states have over 20 years of experience on this issue, and it is essential that federal brownfields legislation further their development and successes. NCSL has a brownfields policy, which is submitted with the testimony.

We commend Representatives Gillmor and Pallone, as well as Senators Smith, Reid, Boxer and Chafee for their efforts to draft brownfields legislation and we look forward to working with you on this issue as it moves through the legislative process. My comments will outline what NCSL considers to be essential elements in a federal brownfields bill. While I will talk further on each issue, NCSL supports brownfields legislation that accomplishes the following objectives:

- Defines brownfields so as to separate them from those Superfund sites or sites with sufficient contamination to be concerned about potential future off-site impacts or potential future use.
- Allows states to determine whether or not a site is a brownfield against a federal statutory definition and, if a state determines that a brownfield site is free of contamination or can be cleaned enough for a designated, deed restricted use, a state should be authorized to immunize a developer from liability or a future cleanup responsibility. That state action should immunize that party or parties from any liability for contamination they did not cause.
- Retains states' primary responsibility for brownfields redevelopment programs. States should be allowed flexibility to determine all aspects of the state brownfields programs in order to tailor programs to meet their unique needs.
- Grandfathers existing State Voluntary Cleanup Programs and honors existing Memorandums of Agreement (MOAs) between states and the U.S. Environmental Protection Agency.
- Increases federal funding for the assessment and cleanup of state brownfields.
- Brownfields legislation should be free standing and relate only to the narrow purpose of allowing states to redevelop abandoned, underutilized industrial and commercial property for which there is minimum likelihood of off-site contamination or endangerment of health and welfare of subsequent users and not used as a means to achieve other Superfund related agendas.

State brownfields programs are an integral part of our nation's ongoing efforts to revitalize former industrial and commercial sites that may be contaminated, may be unused and may have been abandoned. These programs provide a significant benefit to both the environment and the economy of impacted local communities. With increased concerns over urban sprawl and the growing infrastructure gap, investing

more resources in the cleanup of the estimated 450,000 to 600,000 brownfields nationwide makes sense and is good public policy.

FUNDING

NCSL is encouraged by the commitment all of the proposals make to providing federal assistance to states to establish and expand voluntary cleanup programs. This builds on fiscal commitments many states have made and, furthermore, the addition of public funds would assist in closing the gap where the private sector funds are unavailable, providing states the necessary resources to initiate cleanup.

To the extent federal financial assistance is provided, NCSL encourages Congress to ensure that states are provided flexibility regarding expenditure of these funds. This is extremely important for the forty-seven states that currently have voluntary cleanup programs in place. State programs offer a wide variety of incentives—tax breaks for cleanups and the creation of new jobs, low interest rate loans and grant—subsidized technical assistance—to facilitate brownfields redevelopment. States need to be ensured the flexibility to develop programs to address their unique barriers to reach the common goal of cleanup and reuse.

NCSL supports worker training and safety grants. The safety of employees engaged in hazardous waste and redevelopment activities and emergency response activities is an important part of the brownfields cleanup process. Funds for these grants should be in addition to, not taken from existing environmental programs.

Over 16,000 sites have gone through State Voluntary Cleanup Programs, according to the Northeast-Midwest Institute. Here are just a few success stories from my home state of Maryland:

Former Industrial Site: Now a Mixed Use

The first Voluntary Cleanup Program in the southeast neighborhood of Canton, Maryland, took a 4.5 acre site with five abandoned warehouses and factory buildings (the oldest use, a cannery dating back to 1895) and turned it into mixed office and retail project. The project can be credited with the creation of at least 140 jobs in the area. The \$20 million dollar project required an investment of between \$50,000 and \$150,000 for underground encapsulation of lead-contaminated soil. According to the Maryland Department of Environment, the property tax has increased from \$50,000 to \$300,000 since redevelopment.

Former Industrial Site: A New Industrial Site

A second site, Port Liberty, is 30 acres located in Baltimore City. The former industrial site will now be the home to two new industries, the American Post Services, an automobile importer, and Caldwell Cable that produces fiber optics. The project can be credited with the creation of at least 360 jobs in the area. The \$11 million dollar project required a cleanup investment of \$500,000.

In Maryland, a combination of two programs created in 1996 work together to encourage the redevelopment of brownfield sites, sites like those I have just described that are contaminated or are perceived to be contaminated and would therefore go unused. First, the Voluntary Cleanup Program, administered by the Department of Environment, encourages the redevelopment of contaminated properties through a streamlined regulatory process. The program enables eligible purchasers of property to substantially limit liability for past contamination prior to purchase of the property. Second, the Brownfields Revitalization Incentive Program, administered by the Maryland Department of Business and Economic Development provides financial incentives in the form of tax credits, grants, and loans for redevelopment of brownfields properties. These financial incentives were modified in 2000 to include qualified loans or grants for an environmental assessment of the property in order to determine whether and to what extent contamination of the property may exist. The environmental assessment of the property has been an important component of the success of the Maryland's brownfields program because, as you know, even the perception of contamination is a strong deterrent to a potential redeveloper of the property.

Residential Use:

Residential use of brownfields properties is also becoming an increasingly viable option. Although Maryland has yet to approve a residential project, according to 1999 survey conducted by the Northeast-Midwest Institute, California points to 5,200 new housing units developed on brownfields sites. Colorado attributed 2,855 new units to projects gaining approval through its Voluntary Cleanup Program. Michigan has documented 1,400 new units at 11 different sites across the state.

FINALITY

While programs like the ones I have mentioned above have met with considerable success, the potential exposure of future owners to Federal cleanup has a chilling effect on investing in property which may be contaminated. At best this is an excuse to develop a greenfield site: at worst it means that attractive previously used sites with available infrastructure are bypassed.

As a result many brownfield sites remain idle. In the absence of a change in federal law, states cannot immunize a person from cleanup liability caused by a prior user. As a result, clean up and redevelopment opportunities particularly in our older industrial centers are lost as well as new jobs, new tax revenues, and the opportunity to manage growth.

Federal law, more particularly CERCLA, lacks flexibility and impedes the progress of brownfields development. As the 107th Congress considers brownfields legislation, NCSL urges you to adopt legislation that:

- Retains states primary responsibility for brownfields redevelopment programs.
- Allows a state to immunize redevelopment parties from liability or a future clean-up responsibility not caused by their actions.

NCSL recognizes that finality is a contentious issue. Our position is based on current practice. States in general have reported that EPA is not involved or only minimally active in monitoring voluntary brownfields cleanup programs. EPA officials themselves have indicated that EPA has never "reopened" a site deemed clean by a state. While EPA posture places an extra burden on states to ensure environmental protection, NCSL believes states are up to the task.

- In Maryland, we have not revisited any sites, but perform quarterly inspections of each site that has a sign off
- Illinois did revisit one site that had been cleaned to an industrial standard. But that was appropriate due to the fact that there was a proposed change in residential use.
- New York has had a site where additional contamination was discovered, and officials there addressed this by issuing a second voluntary agreement.

NCSL urges the committee to recognize the pivotal role of states in brownfields cleanup. The federal-state partnership in environmental protection is a delicate balance that requires vigorous intergovernmental cooperation. That relationship has been tested and proved effective and any legislation that comes out of this Congress needs to recognize that fact. Over 71 percent of major, Federal environmental programs have been delegated to the states. Over 80 percent of all federal and state enforcement actions are taken by State environmental officials. States need the authority to provide the redevelopers of these otherwise wasted sites meaningful immunity from liability from contamination they did not contribute to or cause.

In addition, non-responsible landowners, including state and local governments, renters, or lessees, and institutions or persons financing cleanup activities at a brownfields site should be provided similar liability protection.

EXISTING STATE PROGRAMS

States have a proven track record when it comes to cleaning up brownfields. In order to ensure and advance the continued success of these programs under any Federal brownfields legislation, State Voluntary Cleanup Programs must be grandfathered and existing Memorandums of Agreement (MOAs) between states and the U.S. Environmental Protection Agency must be honored.

PERMIT PROCESS

NCSL supports any efforts to streamline, minimize or eliminate the federal procedural permitting requirements for actions carried out in compliance with a state program. This administrative relief would allow states to redirect valuable resources to appropriate needs. A 20% match (as proposed in all three documents we are discussing today) might discourage states with tight budgets from participating in the program. However, if states were ensured of this proposed administrative relief, NCSL would find this increase in the match rate somewhat less objectionable.

ADVISORY COMMISSION

Given the states' experience in brownfields cleanup, it is imperative that states be an integral part of any advisory commissions or task forces established to study the issue. If you consider the creation of the Advisory Commission on the Concentration and Impact of Brownfield Sites on Minority and Economically Disadvantaged Neighborhoods, as proposed in the Democratic draft, NCSL urges you to expand the membership to include state and local elected officials. If you are going to be evalu-

ating Voluntary Cleanup Programs that the states fund, it just makes sense to have those of us who make the funds available at the table.

SUPERFUND

As previously stated, NCSL supports brownfields legislation that is free standing and relates only to the narrow purpose of allowing states to redevelop abandoned, underutilized industrial and commercial property for which there is minimum likelihood of off-site contamination or endangerment of health and welfare of subsequent users and not used as a means to achieve other Superfund related agendas.

If, however, Congress is to include amendments to the Superfund program in a brownfields bill, NCSL urges you to:

- Codify EPA's current administrative policy regarding state approval of any new site listings on the National Priority List.

Thank you for this opportunity to appear before you today on behalf of the National Conference of State Legislatures. We look forward to working with you on this issue as it moves through the legislative process. I welcome your questions on the testimony I have provided.

Mr. GILLMOR. Thank you very much.
Mr. Johnson?

STATEMENT OF GORDON J. JOHNSON

Mr. JOHNSON. Good afternoon. My name is Gordon Johnson. I am a Deputy Bureau Chief of the Environmental Protection Bureau in the Office of New York Attorney General Eliot Spitzer.

I am appearing today on behalf of Attorney General Spitzer and on behalf of the National Association of Attorneys General. We very much appreciate the opportunity to appear before the committee today to comment on S. 350, which passed the Senate by a vote of 99 to nothing, in the two draft bills that the subcommittee has before it, each incorporating almost all portions of S. 350.

I am particularly pleased to have been asked back by the House members to comment on this legislation, and I am also pleased to share the panel today with New York's new Commissioner of Environmental Conservation, so that you can hear all of the views of New York State and its leaders.

The passage of S. 350 provides the House with a historic opportunity. I have been handling Superfund cases since 1983—3 years after CERCLA was enacted—and know firsthand the successes and problems with that statute. The Attorney General's office represents State governments and State agencies in Superfund cases, so we are all well aware of the ways the statute encourages and discourages cleanups, negotiations, and settlement.

While CERCLA has become strikingly successful in helping States obtain cleanups at most sites, there still remain that category of sites known as brownfields—abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. Often there is no viable party liable for the contamination who can be compelled to clean it up.

S. 350 is a bipartisan bill which is consistent with resolutions adopted by the National Association of Attorneys General. It is supported by New York's Attorney General Spitzer. I have to concede that not every provision standing alone pleases everybody, which is perhaps why it is a bipartisan bill. But its compromises are carefully crafted. It is an intricate balance of give and take among its many sponsors who have many views of what our laws should accomplish and how they can accomplish that.

And S. 350 is a bill that should be enacted into law. It will bring cities, counties, and States the additional resources they need to build effective programs—programs that will put idle land back into use and bring jobs into blighted communities. S. 350, if enacted, will also ensure that cleanups will be finished, that they will protect the public, and those involved will be treated fairly in return for their agreement to clean up.

We in Attorney General Spitzer's office have to emphasize that attempts to alter the EPA's safety net contained in the bill by reducing S. 350 safeguarding of EPA's ability to protect the public is unwise. And we are fearful that such alterations might doom efforts to obtain brownfields legislation. We can't allow that to happen.

While S. 350 is a historic compromise, the New York Attorney General's office believes there is still room for one improvement which we think neither side of the debate over S. 350 would oppose. In order to prevent new landowners from reaping a windfall due to an increase in a property's value resulting from the Federal Government's cleanup efforts, S. 350, as well as the two drafts, would create a windfall lien in favor of the Federal Government.

Despite the fact that it is State governments who clean up the overwhelming number of sites throughout the country, the windfall lien is limited to the Federal Government.

Attached to my written statement is proposed language drafted by my office that would extend the windfall liens to States, and thus eliminate the unfair treatment of state's expenditures on brownfield sites. In sum, we urge this subcommittee and the House to act expeditiously to enact legislation that enhances state's brownfields programs in a bill that the Senate can also adopt without further extensive debate.

We praise your efforts, and we stand ready to work with you to accomplish that goal.

Thank you.

[The prepared statement of Gordon J. Johnson follows:]

PREPARED STATEMENT OF GORDON J. JOHNSON, ASSISTANT ATTORNEY GENERAL,
STATE OF NEW YORK

INTRODUCTION

My name is Gordon J. Johnson, and I am a Deputy Bureau Chief of the Environmental Protection Bureau in the office of New York Attorney General Eliot Spitzer. I am appearing today on behalf of Attorney General Spitzer and on behalf of the National Association of Attorneys General (NAAG). We very much appreciate the opportunity to appear before the Subcommittee to comment on Senate bill S.350, which passed the Senate on April 26, 2001, by a vote of 99 to 0 and was referred to the House, and the two draft bills the Subcommittee has before it each incorporating most portions of S.350.

The state Attorneys General have a major interest in brownfields legislation. As chief legal officers of our respective states, we enforce state and federal laws in our states and help protect the health and welfare of our citizens, our environment and natural resources. We often are also responsible for negotiating cleanup and natural resource damages settlements, and when a settlement cannot be reached, it is our responsibility to commence and litigate an enforcement action. We are well aware of the blight brownfield sites pose in both our rural and urban areas, and how important it is to cleanup such sites and revitalize the communities and neighborhoods in which such sites are located.

NAAG also has been deeply involved in the Superfund reauthorization process for many years. At its Summer meeting on June 22-26, 1997, the sole resolution adopted by the state Attorneys General addressed Superfund Reauthorization. While

NAAG has not taken a position on either the Gillmor or Democratic discussion drafts, the Resolution called upon Congress to enact legislation that “strengthens state voluntary cleanup and brownfields redevelopment programs by providing technical and financial assistance to those programs, and by giving appropriate legal finality to cleanup decisions of qualified state voluntary cleanup programs and brownfield redevelopment programs,” and that “allows EPA to continue to list new sites on the National Priorities List based upon threats to health and the environment, with the concurrence of the state in which the site is located.” The NAAG Resolution arose from the state Attorneys General’s recognition of the critical importance of the Superfund program in assuring protection of public health and the environment from releases of hazardous substances at thousands of sites across the country. We want to make the tasks of cleanup and protecting the public less complicated and more efficient, and to reduce the amount of litigation and the attendant costs that result.

NEW YORK’S BROWNFIELDS AND VOLUNTARY CLEANUP PROGRAMS

New York has actively participated with NAAG on Superfund Reauthorization issues. It also has been a leader among states in addressing brownfields. In 1996, New Yorkers approved a \$200 million Environmental Restoration or Brownfields Fund as part of the \$1.75 billion Clean Water/Clean Air Bond Act of 1996. Under the Brownfields Program, the State provides grants to municipalities to reimburse up to 75 percent of eligible costs for site investigation and remediation activities at brownfield sites they own. Once remediated, the property may then be reused for commercial, industrial, residential or public use.

The municipality and all successors in title, lessees, and lenders are released from remedial liability for hazardous substances that were on the property prior to the grant, provided that the municipality is not responsible for the contamination at the site. The State indemnifies these same persons in the amount of any settlements/judgements obtained regarding an action relating to hazardous substances that were on the property prior to the grant, and they are entitled to representation by the State Attorney General.

New York’s Voluntary Cleanup Program is a cooperative approach among the New York State Department of Environmental Conservation (DEC), lenders, developers and prospective purchasers to investigate and/or remediate contaminated sites and return these sites to productive use. Under the Voluntary Cleanup Program, a volunteer can enter into an agreement to investigate a site, remediate a site, or investigate and remediate a site. The volunteer agrees to remediate the site to a level which is protective of public health and the environment for the present or intended use of the property. Investigation and remediation is carried out under the oversight of DEC and the New York State Department of Health (DOH) and, in most instances, the volunteer pays the State’s oversight costs. When the volunteer completes work, the DEC provides a release from liability for the work done and the contaminants addressed, with standard reservations.

The Voluntary Cleanup Program covers any contaminated property in the State for which the federal government does not have lead responsibility. The present owner of a site, having purchased the property in an already contaminated condition and not otherwise a Potentially Responsible Party (PRP), is not considered a PRP in the Voluntary Cleanup Program. Eligible participants are anyone other than a PRP for a property that is on the New York State Registry of Inactive Hazardous Waste Disposal Sites classified as posing a significant risk; a Treatment, Storage or Disposal Facility (TSDF) subject to Resource Conservation and Recovery Act (RCRA) corrective action; a TSDF operating under interim RCRA status; or subject to other enforcement action requiring the PRP to remove or remediate a hazardous substance.

Once the protective cleanup level is met, the DEC issues a letter declaring that the DEC agrees that the volunteer has cleaned the site to the previously agreed-upon cleanup level and that, barring an event triggering a reopener, the DEC does not contemplate further action will need to be taken at the site. It also releases the volunteer from further remediation liability for past contamination, subject to reopeners. Non-PRP volunteers also receive a release that covers natural resource damages. All of the volunteer’s successors and assigns (except the site’s PRPs) benefit from the release given to the volunteer. The DEC release binds only DEC, and does not bind private parties harmed by the discharges, does not bind the State’s Attorney General, and does not bind the USEPA. The extent of the investigation and remediation determines the breadth, and hence the value, of the release. The more comprehensive the remedial response, the more comprehensive the release.

Reopeners affect only the volunteer, successor, or assign which owns or operates the property at the time of the reopening, and thereafter. Reopeners are triggered when the response action is not sufficiently protective to allow the contemplated use; when the volunteer, or its successor, changes the site's use to a use requiring a lower level of residual contamination; when the volunteer fraudulently obtains the release; and when environmental conditions present at the site at the time the Voluntary Cleanup Agreement was executed were unknown to the DEC.

As of March 31, 2001, 107 Brownfield Program projects in 53 communities across New York State had been approved for the investigation and/or remediation of brownfield sites. Ninety-five of the 107 projects are investigation projects with a total estimated value of \$9.9 million, and 12 are remediation projects with a total estimated value of \$11.5 million. As of the same date, 196 executed agreements resulted in 255 projects Voluntary Cleanup projects.

Most states also have similar programs. At least 44 states have voluntary cleanup programs, and more than half have brownfields programs as of 1998. What most states lack is sufficient funding. Passage of federal legislation that will help states both establish and administer brownfields programs is essential to the continued success of these state initiatives.

FEDERAL BROWNFIELDS LEGISLATION

Congress has been addressing the contentious issues raised by Superfund Reauthorization for years. As Colorado Attorney General Ken Salazar, NAAAG's Chair of its Environmental Committee, wrote to Senate leaders this past March, the bipartisan bill S.350 is the embodiment of the Senate's recognition of "the blight brownfields continue to cast on our communities," finally translated into a "compromise bill that will hasten the redevelopment of numerous sites." S.350 would provide stricken communities grants and technical assistance to address brownfields that affect their neighborhoods. Attorney General Salazar also wrote that S.350 would give "appropriate legal finality to cleanup decisions of qualified state voluntary cleanup and redevelopment programs, as NAAAG has urged."

When analyzing new legislation that amends the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), we must remember the tortured legal history of that statute. For many years following its passage in 1980, the meaning of numerous terms, the reach of the liability provisions, and the application of the remedy selection provisions were the subjects of contentious litigation. These lawsuits caused delays in cleanups, imposed substantial burdens on federal and state programs, and increased everyone's transaction and cleanup costs. Those days are now over: potentially responsible parties (PRPs) now know what the statute means and where they stand, and thus most are ready to settle their liability with government. EPA's practices also have evolved, and EPA has developed practices that lead to earlier settlements and the quicker implementation of remedial decisions. Finally, the states' own Superfund programs have matured. Many of them are modeled on the federal statute. State officials too understand what CERCLA means and how to use it, and can obtain appropriate cleanups at minimal taxpayer expense. The message is clear: we must avoid changes to CERCLA that will reignite the courtroom battles over the meaning, scope, and implications of the law. At the same time, we must not lose sight of our primary goal—cleanup of sites and protection of the public and future generations. We have no desire to replay the 1980's, even though the States were generally successful in the courtrooms.

Consequently, as the States' primary lawyers, we are concerned whenever new terms are included in proposed amendments to CERCLA. Those who eye brownfield sites as prime real estate ripe for development value the certainty that well-established legal concepts provide them. Consequently, we must be careful whenever a new "standard" is proposed for inclusion in CERCLA, especially when long-used concepts are available that will provide the protection our citizens demand from their governments. The exemptions to the enforcement bar in S.350 are reasonable compromises reached after extensive efforts in the Senate and are well-understood legally. In particular, for decades Congress has used the concept of imminent and substantial endangerment to define when enforcement action is needed; we see no reason to depart from this well-established concept in a House bill.

While S.350 is a historic compromise, the New York Attorney General's office believes that there still is room for one improvement. In order to prevent new landowners from reaping a windfall due to the increase in a property's value resulting from the federal government's cleanup efforts, S.350—as well as the two drafts—would create a "windfall lien" in favor of the federal government. The amount of the lien is equal to the lower of EPA's unrecovered cleanup costs and the increase

in the fair market value of the property due to the government's cleanup efforts. When the new landowners sell the property, EPA can recover on its lien.

Despite the fact that it is State governments who clean up the overwhelming number of sites throughout the country, the windfall lien is limited to the federal government. Attached is proposed language drafted by the New York Attorney General's office that would extend the windfall liens to states and thus eliminate the unfair treatment of states' expenditures on brownfield sites.

Finally, the New York Attorney General's office is very concerned about certain aspects of the Gillmor draft, among others, that could leave the public unprotected from toxic chemical discharges. The draft deletes subparagraphs in S.350 that require certain landowners and operators who are exempted from liability under the bills to take reasonable steps to stop ongoing releases, prevent threatened future releases and limit exposure in order to qualify for the liability exemption. These requirements in S.350 are necessary to protect the public, and have long been the duty of landowners under common law. As part of the carefully honed compromises in S.350, the New York Attorney General's office believes they are a necessary part of any brownfields legislation.

The New York Attorney General's office also is concerned by the Gillmor draft's reduction in the federal cleanup safety net, broadening of liability exemptions, diminishment of public participation requirements, and disruption of the careful balances contained in S.350. We oppose these aspects of that draft both because they represent bad policy and because they render the bill less representative of the compromise necessary for passage.

In sum, we urge this Subcommittee and the House to act expeditiously to enact legislation that enhances states' brownfields programs in a bill that the Senate can also adopt without further extensive debate. The New York Attorney General's office proposes the following amendment to Section 202(b) of S.350, which adds the following section to CERCLA § 107 (added text in bold):

“(p) PROSPECTIVE PURCHASER AND WINDFALL LIEN—

“(1) LIMITATION ON LIABILITY—Notwithstanding subsection (a)(1), a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

“(2) LIEN—If there are unrecovered response costs incurred by the United States or by a State at a facility for which an owner of the facility is not liable by reason of paragraph (1), and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Administrator, for the unrecovered response costs **the United States has incurred, and a State shall have a lien on the facility, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the State, for the unrecovered response costs the State has incurred.**

“(3) CONDITIONS—The conditions referred to in paragraph (2) are the following:

“(A) RESPONSE ACTION—A response action for which there are unrecovered costs of the United States **or of a State** is carried out at the facility.

“(B) FAIR MARKET VALUE—The response action increases the fair market value of the facility above the fair market value of the facility that existed before the response action was initiated.

“(4) AMOUNT; DURATION—A lien under paragraph (2)—

“(A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property;

“(B) shall arise at the time at which costs are first incurred by the United States **or by a State** with respect to a response action at the facility;

“(C) shall be subject to the requirements of subsection (1)(3); and

“(D) shall continue until the earlier of—

“(i) satisfaction of the lien by sale or other means; or

“(ii) notwithstanding any statute of limitations under section 113, recovery of all response costs incurred at the facility.”.

Mr. GILLMOR. Thank you very much, and my thanks to all of the panel.

Let me start out with the questioning. Before we get into some of the specifics, Mayor, I just have a question for you. I know you want a bipartisan bill, because I counted and you said it 18 times.

So I presume that was a message. But I guess, what do you mean by "bipartisan"? Suppose we have a—do you mean all of the Republicans and all of the Democrats—support we have a majority in one party and a significant minority in the other party? I mean, what is bipartisan?

Mr. BOLLWAGE. 99-0.

Mr. GILLMOR. Do you mean we shouldn't pass a bill that is not 99-0? Is that what you are saying?

Mr. BOLLWAGE. No. I just—you know, as someone who reads a lot of newspapers, when I see Jesse Helms and Ted Kennedy vote alike on a bill I would consider that bipartisan. Do you think, you know, that S. 350 could work in our community? I would say absolutely. I mean, that is a bipartisan bill that passed when different members of the ideological spectrum throughout this country came together and cast their vote yes.

I think that if you wanted to take the S. 350 and the provisions of that, I listened to the debate this morning, and I think we are talking more about Superfund issues than we were ever talking about brownfield issues. And I believe that if you took what is in the provision of S. 350, moved it out of this committee to the full House, that would be a bipartisan bill.

Look at what we have done in the city of Elizabeth without any Federal legislation. We have built a mall on a former landfill, 166-acre site, three new hotels, a movie theater, 750,000 square feet of office space. We have taken four other sites, converted them into soccer fields, little league fields. Just imagine what the cities of this Nation could do with support from the Congress. It is likely that S. 350, under most circumstances—

Mr. GILLMOR. Well, I don't want to—

Mr. BOLLWAGE. Okay.

Mr. GILLMOR. Mayor, I don't want to go back over all of that. I just wanted to ascertain what you meant. I hope we get a bipartisan bill within the definition of what most people would consider bipartisan. Even though it might be 420 to one, we will still—

Mr. BOLLWAGE. That would work, Mr. Chairman.

Mr. GILLMOR. That would work?

Mr. BOLLWAGE. That would work.

Mr. GILLMOR. Okay. Let me just ask each one of the panel quickly—under what has been dubbed the Democratic discussion draft, there is a section that is not in either the Senate bill or in the majority discussion draft—creates a five-person advisory commission for international justice would be established in Washington.

That commission would have the power, if only 3 out of the 5 of the non-elected members found any one neighborhood in a State didn't have a meaningful opportunity to participate in a brownfields program, they would then have the authority to disqualify every brownfield site in the State from the liability protections and the finality provisions of the bill.

I guess my question to each of you is: does that kind of policymake sense to you? Commissioner?

Ms. CROTTY. Mr. Chairman, in New York State, like the EPA, we also have a task force on environmental justice. The task force was convened a couple of years ago and is presently coming up with a draft report for my consideration on how to factor in environmental

justice concerns in our permitting process. And I think that that is an appropriate forum for these discussions to take place.

We also are taking into consideration cumulative effects in our State Environmental Quality Review Act, and we believe that environmental justice concerns are real, and we need to create procedures and processes to address those concerns. And we think that we have the appropriate procedures and policies in place or under development to do that. We don't necessarily need it in this piece of Federal legislation.

Mr. GILLMOR. Thank you.
Commissioner?

Mr. GONZALES. Mr. Chairman, just briefly, the National Association of Counties has not taken a position on environmental justice. From a personal standpoint, I would just applaud whatever efforts are done in that area. However, let me State that fundamental to our support for this type of bill, we just want to make sure that we accomplish what we hope the bill is intended to accomplish, and that is to create incentives, not disincentives.

Being a minority, and certainly serving at the local level, let me assure you that there are a lot of local officials across this country that are trying to revitalize poor areas of our community and having tools like this will help meet that objective. Absolutely.

Mr. GILLMOR. Well, the brownfields bill.

Mr. GONZALES. Brownfields legislation.

Mr. GILLMOR. Mayor?

Mr. BOLLWAGE. Mr. Chairman, the U.S. Conference of Mayors has not taken a position on that issue either. But just quickly, we achieved 20 permits with the EPA with support of the Regional Plan Association to reconvert this landfill in 1 year's time.

Mr. GILLMOR. Thank you.
Delegate?

Mr. BILLINGS. The NCSL hasn't taken a position, though, as you know, their general posture is that if these kinds of commissions are created State legislatures ought to be represented on them. We will be reviewing this issue at our annual meeting in August. And if this legislation hasn't passed unanimously through the House by then, we will get back to you with a position.

Mr. GILLMOR. Thank you very much.

Mr. Johnson?

Mr. JOHNSON. Yes. The National Association of Attorneys General also has not taken a position on this. Personally, though, I think that what is important here is to look at the purpose of these provisions. We know from our experience in New York, and I think throughout the country, that redevelopment of brownfield sites does not work if people in the local community are not part of the process, and this commission is an effort to try to make sure that people are fully involved in the process.

And so to the extent that any of the drafts diminish public participation, that is not a good idea, because you can't develop a brownfield site without the locals being part of that process. And that is the key and the key element that I think the committee has to consider.

Mr. GILLMOR. Well, my question was a little more specific. I mean, the specific provision we are talking about—I come from a

State of over 11 million people. You know, we have tens of thousands of brownfield sites. And I guess my question is, in a State of 11 million people with tens of thousands of brownfield sites, should 3 of 5 members of a non-elected advisory committee, because they are unhappy about what happened at one of those sites, be able to terminate the brownfields program in the whole state? That is a specific provision.

Mr. JOHNSON. Well, I do believe the position raises some interesting questions about grant of authority and whether that would be appropriate under our laws. We haven't look at that matter in detail. But, again, the key here is, how do you make sure and how do you ensure that locals in communities are part of the process? Because brownfield development does not work without them being fully part of the decisionmaking on redevelopment of brownfield sites.

Mr. GILLMOR. I will now go to Mr. Pallone, but I think we will probably have time for a couple rounds of questions here.

Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman.

I wanted to start with Mr. Billings, ask him a couple of questions. Is it a correct reading of your testimony that you believe a State, or in this case the Federal legislation, should immunize a developer or a prospective purchaser who did not cause or contribute to the contamination? In other words, a party not liable for the pollution, but no such immunization, liability protection, or restriction on EPA enforcement authority should go to a party who caused the pollution or has the future cleanup responsibility.

I know you stressed this, but I wanted to make sure I understood.

Mr. BILLINGS. Yes. The position of the NCSL policy is that liability/immunity should extend to the redeveloper but not to the potentially responsible party as defined in Superfund, the party that caused or contributed to the contamination in the first instance.

Mr. PALLONE. So there wouldn't be—

Mr. BILLINGS. In Maryland law, Mr. Pallone, we don't—the person who caused or contributed to the pollution in the first instance is not eligible to be a party to a brownfields redevelopment.

Mr. PALLONE. And so you are saying that not only there would be no protection to one who caused the problem, but also no protection to a party who exacerbated it in some way, is that right?

Mr. BILLINGS. That is right. Again, in Maryland law, if the party that is redeveloping the site exacerbates the pollution problem, then they are a responsible party liable for cleanup, irrespective of the immunization of that party from liability that might have occurred before that party came on the scene.

Mr. PALLONE. All right. Let me—

Mr. BILLINGS. And let me just say, Mr. Chairman, that that is why we make this sharp distinction between Superfund and brownfields. We are not—we are talking about sites where you may have only the perception of contamination or very modest contamination. In most of those cases, the issues that you raise aren't going to arise. If this is a site—an assessment of which suggests that it is going to be a serious problem—it shouldn't be in the brownfields program, and nobody should be immune from liability.

Mr. PALLONE. Okay. Well, you know, that kind of goes to my second question, but let me ask it anyway, Mr. Billings. Do you support the provision in the Senate bill—it is on page 42 or 43—that allows the President to exclude NPL—national priority list—caliber sites or sites that pose any significant risk from the definition of an eligible brownfield site?

Mr. BILLINGS. While the NCSL resolution doesn't speak directly to that point, I think it would be implied that any NPL site would not be eligible for brownfield treatment, and any significantly contaminated site short of an NPL site would not be eligible for brownfield treatment.

Mr. PALLONE. So, basically, you believe that the Federal legislation should focus only on sites with marginal or no contamination?

Mr. BILLINGS. That is right, Mr. Chairman. If we can get finality on those sites—we have got a lot of them—we get finality there, let us clean those up, and then we will come back and talk to you about if we need more protection in the future.

Mr. PALLONE. Okay. Thanks. Thank you. That really answers it.

Let me ask Mr. Johnson, as a representative of the chief law enforcement officers of the State, do you believe that the Senate bill S. 350 provides the appropriate amount of finality for State programs? And do you support the four reopeners that are in S. 350?

Mr. JOHNSON. Yes. We believe that S. 350 marks an appropriate balancing of the need for finality with the need for protective cleanups. As the Chair of the National Association of Attorneys General Environmental Committee wrote the Senate in March, he said that S. 350 would "give appropriate legal finality to cleanup decisions of qualified State voluntary cleanup and redevelopment programs as NAC has urged." So we think that it is applying compromise. It may not be what everybody wants, but it is a rather exquisite balancing of the need for appropriate programs and appropriate sign-offs from EPA versus the need for finality. And we think that the four reopeners involved also are appropriate under the circumstances.

We think with this additional element in place our brownfields programs in New York, while they have been very successful to date, will be able to continue and be more successful.

Mr. PALLONE. Thank you.

Mayor Bollwage—I don't know—is there some time left there, Mr. Chairman?

Mr. GILLMOR. Twenty-two seconds.

Mr. PALLONE. I just wanted to—I know that you have been very successful in your brownfields redevelopment in Elizabeth—we talked about that—as you said, without any new Federal legislation.

But in terms of the Senate bill, the broad—you know, the compromise that passed the Senate, do the mayors around the country believe it meets their fundamental needs for brownfields legislation?

Mr. BOLLWAGE. Do we believe that there is fundamental need for brown—yes.

Mr. PALLONE. Do you think that the Senate bill basically would satisfy, you know, the mayor's needs in terms of what, you know, you are trying to accomplish?

Mr. BOLLWAGE. We think the Senate bill—finality, funding, etcetera—addresses all of the key issues of the Nation's mayors and our concerns. We also strongly believe that it is politically valuable, and that it is likely to address most circumstances in many of our cities. And we believe that this bill addresses well over 90 percent of the existing brownfields throughout the Nation.

Mr. PALLONE. Did they pass the resolution about—

Mr. BOLLWAGE. It is attached to my—I believe it is attached to my formal statement. We passed a resolution in Detroit over the weekend that was cosponsored by myself, Mayor McCrory, who is Chair of the Republican Mayors of Charlotte, and Paul Jadin, the Mayor of Green Bay, Wisconsin. We were the co-authors.

Mr. PALLONE. And that was supporting the Senate bill?

Mr. BOLLWAGE. Correct.

Mr. PALLONE. And it was, as you say, both Republican and Democrats?

Mr. BOLLWAGE. Correct.

Mr. PALLONE. All right. Thanks a lot.

Mr. BOLLWAGE. Thank you, Congressman.

Mr. GILLMOR. Ms. Crotty, some groups have argued that there is—I beg your pardon, Vito. The gentleman from New York.

Mr. FOSSELLA. It is the story of my life. Thank you, Mr. Chairman.

And welcome all of the witnesses. In particular, let me welcome Commissioner Crotty, and thank you for coming down. I know the Commissioner has been involved in this matter for more than a decade, and she knows it inside and out and she has done a wonderful job in her new post, albeit a short one. But prior to coming she has been terrific.

In fact, she came to Staten Island when we brought together community leaders, property owners, everyone imaginable—environmental groups—to try to put a local perspective on it. And she has been great since then, so thank you.

Just a couple of questions. I will throw them out there and then, you know, whoever—if you can answer them. To Ms. Crotty and Mr. Johnson, we have different written statements from each of you regarding the New York brownfields program and the various legislative proposals before the committee today. I am just curious, why are these views so different? And who essentially runs the State voluntary cleanup program in New York?

Before you answer that, may I just also ask Ms. Crotty and Mr. Billings to answer as well, the testimony submitted by the Sierra Club for today's hearing argues that with broad-based, state-based liability protections in place, and limited Federal intrusions into State cleanups, that there is simply no need for greater finality for State brownfields cleanup.

They go on—in fact, they actually call for increased, not decreased, Federal involvement in State cleanup programs by requiring EPA review and approval of criteria for State programs before Federal funding could be used. And I am curious, Ms. Crotty and Mr. Billings, what is your view of that approach?

Ms. CROTTY. Thanks, Congressman, and thanks for your kind words. I really appreciate that.

First, with respect to the differing comments by certainly myself and Gordon representing Attorney General Spitzer, we believe, as my statement says—we believe that the Senate bill is a good starting point, but we also believe that there are a number of changes that can be made, modifications that could be made to the Senate bill, that make it even better.

And my testimony certainly identifies the areas that we think are an improvement over the Senate, and we encourage the House to come to an agreement on those initiatives. In terms of who runs the voluntary cleanup program in New York State, the State Department of Environmental Conservation runs the voluntary cleanup program in New York State. And we are ultimately the ones who decide what the cleanup is going to be and issue the no further action letters or the liability limitation letters.

With respect to the Sierra Club's comments, I haven't read them yet. However, from my perspective and the Department's perspective, this issue of finality is extremely important to municipalities, to not-for-profits that are redeveloping property, as well as to private developers, and finality to everybody involved.

So we want to be able to make it easier for parties to clean up contaminated sites, not harder for parties to clean up contaminated sites. Or putting it another way, let us get rid of the artificial barriers. And if you have a State program that EPA—meets EPA's criteria for a brownfield program, then cleaning up a site to the satisfaction of that regulatory agency should be the final say.

And I think that that will—except for those limited circumstances that the House majority draft identified, and I think that that will act as an incredible incentive to bring more private dollars in to clean up brownfields, which is ultimately what we are looking for.

Mr. FOSSELLA. Mr. Johnson? Mr. Billings?

Mr. JOHNSON. The EC does an excellent job in running the voluntary cleanup program, and they have been able to reach numerous settlements and obtain cleanups throughout the year—throughout the last years, despite the absence of any kind of finality.

We get the cases where the EC has been unsuccessful, because the task falls to the Attorney General's office to recover the moneys that the State has been compelled to spend to clean up those sites where a State wasn't able to get a voluntary cleanup agreement.

So we really have an idea and a good feeling for the pulse of the reasons why those sites aren't being addressed, particularly the sites where the State goes out and, because they need to be cleaned up, they are cleaned up using State moneys.

Our feeling on the finality provisions are really twofold. No. 1, we think that the finality provision in S. 350 is good and appropriate, and it balances the need to make sure that a cleanup is good and protective with the need for finality. If we look at S. 350, we have to remember that there is no provision, for instance, in S. 350 for certification, for instance, of a State program.

[The prepared State program has an incentive to meet EPA criteria because then it receives grant money, but there is no requirement that the program itself be a certified program before the enforcement bar comes into effect. You have to balance that com-

promise with the other compromise, which is that EPA could come in, when necessary, just as EPA is available to come in in numerous Federal programs under the Clean Water Act, RCRA, and so on and so forth, when those are State delegated programs. We think that S. 350 gives an appropriate balance.

The other reason to like S. 350 is that it passed. It was enacted 99 to nothing. We think that S. 350 can pass the House at close to the same level. And that combination of ingredients tells us that let us keep it the way it is, let us pass that legislation, and let us get the other aspects—the funding and that basic finality that we need to go ahead to help make our brownfields programs better.

As with respect to the Sierra Club provision, I haven't, you know, looked at that in particular. I do have a feeling, though, that at least in New York we don't need EPA oversight to tell us that our cleanups are good. And so for our State we can administer a program and do it well. We have done it well for 20 years, and EPA has full confidence in us. And I am not sure we want EPA involved in every decision that gets made down the road about every site.

Mr. GILLMOR. We have a very limited amount of time left before we have to go over and vote. And what I would like to do, with the concurrence of the members, is maybe each of us can do one more quick question, not take our full time, and that ought to enable us to get over and vote.

Mr. FOSSELLA. Mr. Chairman, if I may, Mr. Billings was about to respond, and then—

Mr. GILLMOR. Yes. Go ahead.

Mr. FOSSELLA. [continuing] it is your committee, do what you want.

Mr. GILLMOR. Well, we want to do it as expeditiously as possible.

Mr. BILLINGS. And I will try to be very quick. I also have not read the Sierra Club testimony. I must tell you, Congressman, that when we tried to write brownfields legislation in Maryland the single biggest obstacle we had was convincing the parties that were interested in the legislation that we are talking about brownfields and not Superfund.

I believe that it is very likely that the Sierra Club's concerns are related to the fact that both of these bills—all of these bills address Superfund in some way, some more than others. If you narrow this to brownfields, to legitimate, real brownfields, keep it narrow, I think those kinds of concerns will disappear.

That is the fight I had to fight in Maryland. I lost a little of greenness in the process. But we carried the day.

Mr. GILLMOR. Let me real quickly—Commissioner Crotty, I want to ask you a question on MOA. There have been some groups who have argued there is no need for greater finality for State brownfields because the current memorandum of agreement process between State voluntary cleanup programs and the EPA is a form of finality.

But, in fact, only 16 States have MOAs, and New York does not. So I guess my question was: do you think the MOA process defeats the need for stronger finality? Or what has been your experience in New York with the MOA process? And maybe you could tell us some of the reasons why New York does not have an MOA.

Ms. CROTTY. Sure. Absolutely. Actually, before I became Commissioner, I was a deputy commissioner for water quality and remediation, and I was the first deputy commissioner to try to negotiate an MOA with EPA Region 2, and very soon broke off negotiations because the language that they wanted in the MOA was so open-ended that it really became a second guess on all of our cleanups.

They wanted language that I will note is included in Senate 350 and in the Democratic discussion draft of these kind of NPL caliber sites. You know, EPA has the authority to go in and remediate if they determine that the site is an NPL caliber site. And that, from our perspective in New York State, gave us a lot of worry because it is a very open-ended issue. Does that mean you have to get scored and put on the hazard ranking system? Does that mean that you can—EPA would second-guess every single cleanup that we entered into?

And so we felt at that time that we could assure the developers, the municipalities, the not-for-profits, that it is a very rare instance—and Deputy Administrator Fisher said this this morning. You know, it is a very rare instance when EPA is going to go in and second-guess a State when a party has cleaned up to the satisfaction of the State. Yet it is a risk, and it is a risk that some parties are willing to bear, but I have heard from other parties that they are not willing to bear it.

And so I think that the language that is in the House majority draft that talks about the kind of criteria or having a brownfield program with certain criteria is the right way to go. And, certainly, the Deputy Administrator comments about how she doesn't want to have to sign off on every single State cleanup program is an appropriate way to go as well.

Mr. GILLMOR. Thank you very much.

Mr. Pallone, we are almost out of time. Do you want to take real—before you start, let me ask—

Mr. PALLONE. Let me just ask—

Mr. GILLMOR. Yes, go ahead.

Mr. PALLONE. [continuing] if I could just ask Ms. Crotty, what are the criteria that you were referring to, you were just mentioning?

Ms. CROTTY. Well, the House majority draft—actually, I think it is on page 41—gets to this issue of finality. Or 51—wrong one. And we think that what the—without flipping through the pages, conceptually what the Deputy Administrator was saying this morning is something that is very advantageous from a State perspective, which is in order to get access to these brownfield funds you need to have a program that meets certain criteria that EPA has identified in a guidance document.

And I think that that is an appropriate way to go. It is flexible. Not every State has the same brownfield program. We are very different. In New York I have four brownfield programs. In New Jersey, I don't think you have as many. And so each State is tailoring its brownfield cleanup programs to the risks that are presented in front of them.

Mr. PALLONE. You are saying that the States should meet the minimum criteria, though.

Ms. CROTTY. I believe that States need to—if you want to have finality to your program in terms of finality to limit the liability of the Federal Government to go after the party who has cleaned up to the state's satisfaction, you have to meet minimum requirements.

And as the Deputy Administrator said this morning, she is going to spell those out in guidance documents. And so I think that that is a fair bar to reach.

Mr. PALLONE. All right. Thank you. I know we are running out of time, but thank you all.

Ms. CROTTY. Thank you.

Mr. PALLONE. We only have 4 minutes.

Mr. GILLMOR. Yes. Are you referring to the language on page 41?

Ms. CROTTY. I believe I am. Let me just quickly look. Yes.

Mr. GILLMOR. I just wanted to make sure. It is?

Ms. CROTTY. Yes.

Mr. GILLMOR. Okay.

Ms. CROTTY. Yes.

Mr. GILLMOR. They are the majority bills.

Ms. CROTTY. Yes, it is on—starts on line 16.

Mr. GILLMOR. Okay.

Ms. CROTTY. No. Starts on—

Mr. GILLMOR. Starts on line 1, page 41.

Ms. CROTTY. Yes.

Mr. GILLMOR. Yes. Okay. We are out of time. I want to thank you.

Let me ask you—if members had questions in writing to submit to you, we would appreciate it if you could answer us. We will go vote, come back with panel three immediately. Thank you very much.

[Brief recess.]

Mr. GILLMOR. We will reconvene for the last panel, and I want to commend this panel for a number of things. We are grateful for your patience.

Before we start, let me call on my colleague from Ohio, Mr. Brown, to comment on one of the panelists.

Mr. BROWN. I thank the chairman, and thank you for allowing me to introduce my friend, John Lynch. I apologize for only coming in a few minutes ago. My Health Subcommittee was meeting—has been meeting all day, and I have got to run to something else, too.

But I wanted to take the chance, first of all, to thank the chairman for his good work on brownfields. The chairman and I share a county, Lorraine County. My district goes east from there; his goes west. But he has been—had a commitment to brownfields legislation.

The legislation sponsored by Senator Chafee and the discussion drafts that you and Mr. Pallone have circulated in the House are particularly important, and I applaud you for that, and we need to be respectful I think of the broad majority that S. 350 has commanded in the Senate and the delicate compromise it represents.

John Lynch is a former member of Cleveland City Council and was on the City Council for 12 years, serving with two of our colleagues, one of our colleagues now and one previous colleague. He served on Council with Congressman Kucinich, served on Council

with former Congresswoman Mary Rose Oakar, and served on the Council as Senator Voinovich as mayor.

So he has known this business a long time, and he and I have worked on energy issues together, on other kinds of development issues together, and it is my pleasure that John Lynch has joined us today.

And I thank the chairman for allowing me to submit a few remarks. Thank you, Mr. Chairman.

Mr. GILLMOR. We will proceed with our panel. Mr. Garczynski?

STATEMENTS OF F. GARY GARCZYNSKI, FIRST VICE PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; DANIEL R. DeMARCO, MANAGING DIRECTOR OF REAL ESTATE, CAMPANELLI COMPANIES; JOHN LYNCH, BROKER/OWNER, LYNCH & COMPANY; LARRY ROTH, DEPUTY EXECUTIVE DIRECTOR, AMERICAN SOCIETY OF CIVIL ENGINEERS; AND ED HOPKINS, DIRECTOR OF ENVIRONMENT QUALITY, SIERRA CLUB

Mr. GARCZYNSKI. Mr. Chairman, thank you very much. Congressman Pallone, and other members of the subcommittee, I am Gary Garczynski, a builder/developer from Northern Virginia who works in Northern Virginia and Metropolitan Washington, DC, and I am also the first vice president of the National Association of Home Builders appearing here on behalf of our 203,000 member firms.

For the past 4 years I have also been the oversight officer for NAHB's smart growth initiative, and we work together to try to bring a lot of stakeholders to the table, and interest groups, on the common goal of how we grow as a country, meeting the growth challenge, and creating affordable decent housing for all Americans.

We partnered with the U.S. Conference of Mayors and HUD to build a million homes in America's cities over the next 10 years, and part of that revitalization effort certainly has to be centered on brownfields. Currently, we feel that Federal law and EPA policy are insufficient to provide certainty to developers who remediate a brownfield site under a State brownfields program.

Federal legislation is necessary to provide incentives and greater protection to spur meaningful redevelopment and urban revitalization. The GAO estimates that are approximately 450,000 brownfield sites nationwide, and of these sites up to as many as 200,000 contain abandoned underground storage tanks that are impacted by petroleum leaks.

Mr. Chairman, your draft—discussion draft encourages us as developers to redevelop this broader universe of sites by providing incentives for the cleanup of petroleum sites in two significant areas. First, in addition to the CERCLA protections, prospective purchasers who successfully complete a statewide cleanup brownfields program or purchase a remediated site are afforded additional protection from RCRA liability and enforcement authority.

Second, in the finality section, in addition to including protections for Superfund contaminants, your draft extends Federal enforcement protections for petroleum contaminated sites as well.

Unfortunately, S. 350 and the Democratic discussion draft treat petroleum as kind of a second-class citizen without a policy ration-

ale. Both bills provide prospective purchasers with liability protection under CERCLA only. In the finality section, each bill includes Federal enforcement protections for Superfund contaminants alone.

The absence of any enforcement protections for petroleum contaminated sites represents I think a significant limitation to S. 350 and the Democratic discussion draft. On finality, we believe that EPA has an important role in protecting health and the environment, but States are in a better position to be the primary authority to investigate site contamination, establish cleanup standards, and determine when those cleanup standards have been achieved.

As stated earlier, your draft provides an appropriate level of certainty by foreclosing EPA enforcement under both CERCLA and RCRA. However, S. 350 and the Democratic discussion draft lack the certainty and finality necessary to overcome the perception that EPA could intervene—that currently inhibits brownfield development.

The reopener provision on the insufficient standard States that the Federal brownfields legislation must provide not only certainty and finality for site developers and owners but also an appropriate Federal safety net, authorizing EPA to exercise its enforcement authority in clearly defined circumstances commonly called “reopeners.” I think the Gillmor draft replaces information with contamination and conditions, and, therefore, eliminates the potential for the mere existence of the new information which may be subject to a reopener as in S. 350 and the Democratic discussion draft.

I know we are running out of time right now, and I am sure we are going to have questions later. But I would, in conclusion, State that I believe as a practitioner we are here to try to encourage and incentivize the development of brownfields. We don’t think S. 350 goes far enough to provide that finality or is broad enough to cover minor contaminants such as petroleum.

We are grateful for the opportunity to discuss this issue, and I would also encourage you during your debates on this issue to ask some lenders to step forward, because unless you have people like myself as a builder or developer, who can be financed by a lender, you can pass a lot of laws on brownfields but the private sector has to be involved if we are really going to make this a successful program. That is what we see as necessary at NAHB.

Thank you.

[The prepared statement of F. Gary Garczynski follows:]

PREPARED STATEMENT OF F. GARY GARCZYNSKI, FIRST VICE PRESIDENT ON BEHALF
OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Chairman Gillmor, Mr. Pallone and members of the Subcommittee, I am pleased to appear before you today on behalf of the 203,000 members of the National Association of Home Builders to testify on federal brownfields legislation. My name is Gary Garczynski and I am the First Vice President of the National Association of Home Builders. I am a home builder and a land developer from Northern Virginia.

For the past four years, I have been involved in developing NAHB’s Smart Growth strategy and personally working to bring together all stakeholders and interest groups for the common goal of solving our growth concerns. As we have worked together, brownfields redevelopment has emerged as one of the cornerstones of our efforts.

IMPORTANCE OF BROWNFIELDS AND SMART GROWTH

Brownfields are agricultural, commercial or industrial properties that are impacted by contaminants, including hazardous substances as defined under the Com-

prehensive Environmental Response, Compensation and Liability Act (CERCLA) and petroleum products. Historically, developers have avoided these properties because of concerns relating to the uncertain environmental liabilities at those properties under state and federal environmental laws. Because of these liability concerns, brownfield properties are typically passed over in favor of undeveloped “greenfields” sites where potential contamination and the related liability does not present obstacles to development.

As you know, brownfields redevelopment, if done correctly, presents a unique opportunity to marry economic development with the principles of Smart Growth and environmental protection. Brownfields redevelopment has the potential to slow the development of open space and farmland by presenting property owners and developers with access to brownfields sites located in desirable locations, with existing infrastructure and affordable pricing. Additionally, brownfields redevelopment is consistent with the notion of reestablishing our communities. Many brownfields sites are located in urban areas or close-in suburbs within walking distance or in close proximity to existing amenities such as transportation systems, restaurants and shops. This proximity both fosters the sense of community and satisfies the increasing needs of our population.

STATE EFFORTS TO ADDRESS BROWNFIELDS REDEVELOPMENT

During the past several years, state legislatures, State environmental protection agencies and the United States Environmental Protection Agency (EPA) have all proactively promoted brownfields redevelopment through legislative and regulatory initiatives. Currently at least 43 states have some form of brownfields legislation or voluntary cleanup programs that actively encourage the remediation, reuse or redevelopment of environmentally impaired property. *Brownfields and Housing: How Are State VCPs Encouraging Residential Development?*, Bartsch and Dorfman, Northeast-Midwest Institute, April, 2000. These State programs encourage brownfields redevelopment through a combination of techniques including: (1) credible financial incentives for investigating, remediating and reusing contaminated properties; (2) flexible, yet certain remediation standards which allow cleanups to reflect the actual risk posed by the contamination at a site; and (3) transferable liability protection to all future property owners and tenants once these remediation standards have been attained.

As one would expect, state brownfields programs provide liability protection under state law only. The question, then, becomes what protections exist under federal environmental statutes for owners and tenants of brownfields sites after cleaning up the property in compliance with state remediation standards? It is with respect to this last question that federal brownfields legislation becomes essential.

THE NEED FOR FEDERAL BROWNFIELDS LEGISLATION

Recognizing the need to create incentives to develop brownfields properties, EPA has adopted a series of brownfields policies and guidelines. These programs provide, among other things, funding for brownfields assessment and remediation, job training, tax incentives, and guidance on those circumstances where EPA may exercise its discretion not to impose liability on a developer of a brownfields site under federal environmental statutes.

Current federal law and EPA’s policies, in particular, do not provide liability protection for developers or owners of contaminated property who remediate property to state standards. Therefore, EPA may impose additional remediation requirements at brownfields sites. Indeed, even where a developer has remediated contamination at a brownfields site to the satisfaction of a State environmental agency under a well established, well funded, stringent State brownfields program, EPA retains its authority to independently require further remediation under federal environmental statutes.

Federal environmental statutes which require remediation of contaminated property [e.g., CERCLA; the Resource Conservation and Recovery Act, 42 U.S.C. § 9609 *et seq.* (“RCRA”) and the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (“TSCA”)] typically impose strict liability on those parties owning contaminated property, even where those parties did not cause the contamination. As a matter of practice, EPA rarely requires additional remediation of brownfields properties under these federal authorities once a property has been remediated to State cleanup standards. However, nothing prohibits EPA from doing so. Therefore, the perceived threat of EPA intervention, rather than EPA’s actual enforcement activities to date, significantly inhibits developers from attempting a brownfields site remediation. Simply, the perception is the reality. Under current law, a developer has little

incentive to acquire a brownfields site and remediate it to the satisfaction of a State environmental agency while EPA enforcement remains a distinct possibility.

EVALUATION OF THE GILLMOR JUNE 13TH DRAFT, THE DEMOCRATIC DISCUSSION DRAFT
AND S.350

Petroleum Contaminated Sites Must Be Accorded the Same Protection as Other Sites

To encourage builders and developers to redevelop petroleum-contaminated sites, it is imperative that prospective purchasers, who successfully complete a state clean-up/brownfields program, are protected from RCRA liability and enforcement authority. The Gillmor Discussion Draft has recognized and acknowledged that petroleum contamination is a concern for developers. Under Section 129 of the Gillmor Discussion Draft, in addition to CERCLA enforcement protection, the draft provides additional liability protection under RCRA Section 7002(a)(1)(B) and 7003, 42 U.S.C. § 6972(A)(1)(B) and 6973.

Neither S.350 nor the Democratic Discussion Draft provides this protection. Section 129(b)(1)(A) of S.350 and the Democratic Discussion Draft provides that the president may not use the authorities under sections 106(a) or 107(a) of CERCLA against any person conducting or completing a response action regarding a specific release in compliance with a State brownfields program. This section represents the cornerstone of S.350's and the Democratic Discussion Draft's attempt to restrict EPA's enforcement authority where a brownfields property is remediated under a State brownfields program.

However, Section 129(b)(1)(A) restricts EPA's enforcement authority under CERCLA alone. CERCLA expressly applies to remediation of a release or threatened release of hazardous substances. 42 U.S.C. §§ 9604, 9606(a), 9607(a). Hazardous substances, as defined under CERCLA, expressly exempts petroleum products, including crude oil or any fraction thereof, natural gas and natural gas liquids. 42 U.S.C. § 9601(14). Therefore, S.350 and the Democratic Discussion Draft do not provide any enforcement protections regarding petroleum-contaminated sites.

The absence of any enforcement protections for petroleum contaminated sites represents an extremely significant limitation to S.350 and the Democratic Discussion Draft. The General Accounting Office estimates that there are approximately 450,000 brownfields sites nationwide. Out of these sites, EPA estimates that 100,000 to 200,000 sites contain abandoned underground storage tanks or are impacted by petroleum leaks. *EPA USTfields Initiative*, www.epa.gov/swerosps/bf/index.html. EPA has recognized the importance of petroleum contaminated brownfield sites along with the current barriers that prevent EPA from effectively addressing these petroleum contaminated sites. S.350 and the Democratic Discussion Draft attempt to solve this problem by devoting a portion of federal grants funding to assist in the clean-up of these sites, however only the Gillmor Discussion Draft matches the grant funding with needed enforcement and liability protections for developers and other prospective purchasers who attempt remediate petroleum contaminated sites. Petroleum contaminated sites are obvious targets for redevelopment because of their prime locations and the well-known and cost-effective remediation technologies available for petroleum contamination.

As a matter of policy and logic, there is no apparent basis for treating hazardous substance contamination under CERCLA more favorably than petroleum contamination. On the contrary, since there are numerous petroleum contaminated sites and these sites present attractive development opportunities, federal brownfields legislation should provide at least the same liability protections for petroleum contaminated sites as for sites contaminated with CERCLA hazardous substances.

Additional Liability Protection for Prospective Purchasers who Purchase Petroleum Sites

The Gillmor June 13th Discussion Draft provides additional liability protection to "prospective purchasers" under RCRA Section 7002(a)(1)(B) and 7003, 42 U.S.C. § 6972(A)(1)(B) and 6973, and RCRA's provisions relating to a release of petroleum from underground storage tanks, 42 U.S.C. § 6991b(h). Whereas S.350 and the Democratic Discussion Draft provide prospective purchasers with liability protection under CERCLA alone, the Gillmor Discussion Draft has the foresight to provide an additional level of protection for the purchasers of petroleum-contaminated sites. Simply, the Gillmor Draft provides a greater incentive for developers to tackle petroleum sites.

EXTENSION OF ENFORCEMENT LIMITATIONS TO FUTURE OWNERS AND TENANTS

As I mentioned previously, any brownfields legislation must provide for the transfer of enforcement protections and liability protections from current owners to future

owners, leaseholders, or tenants of these properties. Existing state programs, EPA enforcement policy, and previous federal brownfields legislative proposals all have tied the enforcement and liability protections directly to the property, or the contamination itself, rather than the current owner or remediator. In fact, several EPA CERCLA enforcement policies promulgated over the past decade consistently hold that owners of contaminated properties who did not cause or contribute to a release of a hazardous substance, or who purchased contaminated property after the contamination was released, are not subject to EPA enforcement action under sections 106 or 107 of CERCLA. I am pleased the Gillmor Discussion Draft continues this common-sense practice.

Under the Gillmor Discussion Draft, the EPA is limited from bringing an enforcement action at a brownfields site where a release is being remediated under a state clean up program. Tying the enforcement limitations directly to the release at a brownfields site affords future owners, leaseholders and tenants the much needed peace-of-mind when contemplating the acquisition or rental of a former brownfields site.

To the contrary, the enforcement limitations provided by Section 129(b)(1)(A) of S.350 and the Democratic Discussion Draft apply only to a person who “is conducting or has completed a response action regarding the specific release” under a State brownfields program. Read literally, this language potentially excludes from S.350’s and the Democratic Discussion Draft’s enforcement protections both current developers of a brownfields site as well as future owners and/or tenants of that site. Two examples illustrate this problem.

First, assume a property owner seeks to sell contaminated property and agrees with the proposed buyer/developer that the property owner will complete the required remediation under State law prior to closing. In this circumstance, the developer will not be a person “conducting” or “completing” the required response action and would fall outside the protections of Section 129(b)(1)(A).

Second, assume that the proposed developer, not the property owner, conducts and completes the response action. Subsequently, the developer sells the property to another developer who leases the property to a tenant. Again, neither the second developer nor the tenant fall within the language of Section 129(b)(1)(A) because they did not “conduct” or “complete” the response action. For these reasons the provisions of S.350 and the Democratic Discussion Draft should be amended to expressly apply to all parties who participate in the response action and all future owners or tenants of that property.

The federal enforcement protections under Section 129 of S.350 and the Democratic Discussion Draft seriously undermine existing EPA policy by identifying only those parties who participated in the clean up as being eligible for enforcement protections.

FEDERAL BROWNFIELDS LEGISLATION MUST PROVIDE FINALITY

NAHB fully recognizes the importance of EPA’s enforcement role in ensuring protection of public health and the environment. NAHB also recognizes and supports the fundamental presumption of state primacy under all three of the bills presented here today. Existing state brownfields programs must be the primary authority to investigate site contamination, establish clean-up standards sufficient to protect public health and the environment, and determine when those clean-up standards have been achieved. For any federal legislative proposal to be successful, it must strike a balance between two important objectives: maintaining EPA’s enforcement role and ensuring finality to prospective purchasers that have successfully completed a state brownfields program.

Fundamentally, federal brownfields legislation must ensure that for those sites where (a) EPA is not currently requiring remediation under federal environmental statutes, and (b) remediation has been completed to the satisfaction of a State environmental agency, EPA will, as a matter of law, not seek further remediation under federal statutes except under defined circumstances. This framework provides the essence of needed federal brownfields legislation: creating the requisite certainty to developers of brownfields property, removing the perception of EPA overfiling, and providing finality in the form of statutory liability and federal enforcement protections. At the same time, this framework necessarily must retain appropriate enforcement authority for EPA, a so-called federal “safety net,” under clearly defined circumstances.

The Gillmor Discussion Draft provides an appropriate level of certainty by prohibiting enforcement under CERCLA Section 106, 107, or 113, 42 U.S.C. 9606, 9607, or 9613, and RCRA Sections 7002(a)(1)(B) and 7003, 42 U.S.C. 6972(a)(1)(B) or 6973. Importantly, the Gillmor Discussion Draft, in addition to including protections

for Superfund contaminants, once again has recognized the critical necessity of providing enforcement protection for petroleum-contaminated sites. In sum, the Gillmor Discussion Draft couples the limitations on federal enforcement with the limited reopeners in Section 129(b)(1)(B) to provide an effective balance between finality and the federal “safety net.”

To the contrary, S.350 and the Democratic Discussion Draft lack the certainty and finality necessary to overcome the perception of EPA intervention that currently inhibits brownfields development. Clearly, intent of Section 129(b)(1)(A) of S.350 and the Democratic Discussion Draft is to provide a certain measure of finality for persons remediating hazardous substance contamination in compliance with State brownfields programs. However, by limiting EPA’s enforcement authorities under CERCLA, without similar limitations on EPA enforcement authorities under RCRA, S.350 and the Democratic Discussion Draft only partially accomplish this goal.

Simply stated, by limiting Section 129(b)(1)(A) to CERCLA, a person remediating hazardous substance contamination under a State brownfields program will be subject to potential federal intervention under RCRA for the exact same hazardous substances. As an example, assume that a site is contaminated with benzene in soil and groundwater and that a developer remediates that contamination to the satisfaction of a State environmental agency. Section 129(b)(1)(A) provides a developer with certain protections from CERCLA enforcement. The developer does not, however, receive any protections against a third party law suit under RCRA Section 7002(a)(1)(B) or an EPA enforcement action under RCRA Section 7003.

For this reason, providing a limitation on EPA’s CERCLA enforcement authority alone does not resolve the concerns regarding EPA intervention that gave rise to Section 129(b)(1)(A) of S.350 and the Democratic Discussion Draft.

FEDERAL BROWNFIELDS LEGISLATION MUST NOT INCLUDE REOPENER PROVISIONS WITH INSUFFICIENT STANDARDS

As set forth above, federal brownfields legislation must provide not only certainty and finality for site developers and owners, but also an appropriate federal “safety net” authorizing EPA to exercise its enforcement authorities under federal environmental statutes in clearly defined circumstances. These provisions, sometimes referred to as reopeners, are contained in Section 129(b)(1)(B) of S.350 and the Democratic Discussion Draft. The specific reopener provided for in Section 129(b)(1)(B)(iv) of S.350 and the Democratic Discussion Draft is overly broad and as a result threatens to significantly undermine the finality and certainty that S.350 and the Democratic Discussion Draft correctly seek to achieve.

Specifically, Section 129(b)(1)(B)(iv) of S.350 and the Democratic Discussion Draft provides that EPA may bring an enforcement action if:

The Administrator, after consultation with the State, determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health, welfare or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination.

There are two fundamental problems with this provision. First, information known to the State “on the earlier of the date on which cleanup was approved or completed” forms the baseline for determining whether “new” information has been discovered subsequently. In many instances, a State environmental agency approves a cleanup plan and the remediator thereafter continues to generate data during the course of designing and implementing the approved cleanup. Pursuant to Section 129(b)(1)(B)(iv), *any and all* data generated during remedial design and remedial action will be newly discovered and potentially subject the remediator to EPA enforcement.

Second, and more significantly, the mere existence of any new “information” such that the contamination or conditions present any threat is a standard without boundaries. Several examples illustrate this point. First, assume a report issued by an organization, whether or not peer reviewed, alleges that a particular contaminant at a site poses a marginally greater risk than previously thought. In that circumstance, the “information” reopener contained in Section 129(b)(1)(B)(iv) potentially applies notwithstanding the validity of the report or whether the risk remains within the range documented as part of the State approved cleanup. Second, any migration of contaminants within a site, which is a normal occurrence, would potentially be subject to this same reopener. Finally, any fluctuation in sampling results,

within the same order of magnitude (even expected seasonal fluctuations) could potentially subject a particular site to a reopener.

In sum, there is no standard contained within Section 129(b)(1)(B)(iv) that constrains the quality, reliability, authority or environmental significance of the new information. As such, this reopener is potentially so broad as to eliminate the very protections S. 350 and the Democratic Discussion Draft seek to create.

As an alternative, Section 129(b)(1)(B)(iv) of the Gillmor Draft reads:

(iv) the Administrator, after consultation with the State, determines that *contamination or conditions*, that on the later of the date on which cleanup was approved or completed, were present at the site but were not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, have been discovered that present a threat requiring further remediation to protect public health or welfare or the environment and the State will not take the necessary response action.

By replacing “information” with “contamination and conditions,” the Gillmor draft eliminates the potential for the mere existence of any new “information” to subject a particular site to a reopener. “Contamination and conditions” is a concrete standard by which EPA and the developer can quantify the level of threat at a site and whether that threat warrants the exercise of EPA’s enforcement power.

Additional Weakening Provisions in the Democratic Discussion Draft

The Democratic Discussion Draft contains several additional provisions that render the federal enforcement protections contained in Section 129 virtually meaningless.

First, the Democratic Discussion Draft includes, as an additional reopener under Section 129(b)(1)(B) that allows EPA to reopen a site that has completed a state approved clean up if:

the cleanup of the site under the response action plan of the State program no longer protects human health or the environment, as determined by the Administrator or the State, because of a change or a proposed change in the use of the site.

This reopener is overly broad and unnecessarily undermines the finality of state-approved response actions. For example, the reopener applies to any “change or proposed change in the use of the Site.” Pursuant to this sweeping language, even a change (or for that matter a proposed change) from one industrial use to another would authorize EPA to reconsider the state-approved response action. Moreover, this reopener is unnecessary because S. 350 and the Democratic Discussion Draft already contain a reopener where changed conditions exist.

To the extent, however, that a specific reopener for change conditions in land use is deemed necessary, the reopener should be drafted to ensure that it applies only to significant changes in land use, such as a change from non-residential to residential uses. Significant changes in land use are those which fundamentally alter the exposure assumptions upon which the State approved the response action.

The Gilmore Discussion Draft addresses site use changes in precisely this manner. Specifically, in section 202(c)(3), a prospective purchaser loses its defense to liability only while the change in site use is “inconsistent” with the terms of the state-approved response action.

Second, the Democratic Discussion Draft creates a litany of standards that a state program must satisfy in order to become a “qualified” state program for the purposes receiving federal enforcement protection under Section 129 of the legislation. The conditions that this legislation would impose on states are nothing more than a thinly veiled attempt to grant EPA review of existing state programs. Furthermore, these conditions undermine the presumption of state primacy that the Democratic Discussion Draft pretends to support.

Finally, Title IV of the Democratic Discussion Draft creates an Advisory Commission on the Concentration and Impact of Brownfield Sites on Minority and Economically Disadvantaged Neighborhoods. While the impetus for the creation of this commission is honorable, the provision contained in Section 401(c) is a direct assault on state authority and on EPA’s authority. This subsection allows for the revocation of the federal enforcement protections granted under 129(b)(1)(A) if the commission finds that minorities and economically disadvantaged neighborhoods are not allowed “meaningful” public participation in the state clean up program. This provision gives appointees, who may not have the requisite expertise and knowledge, unprecedented control and review of state programs and short-circuits the ability of EPA to exercise its authority under 129(b)(1)(B) of the legislation. Furthermore, the level of technical expertise required for appointment to this commission in the fields of; health science, risk assessment, and engineering is undefined. Our concern is the creation of this federal commission would result in this commission passing judge-

ment on state voluntary clean-up programs with no direct knowledge of these programs.

CONCLUSION

For four years, I have personally sought to marry the principles of Smart Growth with a wide variety of interest groups, governments, developers, site owners, community groups and environmentalists to reach common ground. A cornerstone of that effort is brownfields redevelopment. However, as attractive as brownfields development appears, any effort that strangles private sector participation will prove to be an exercise in futility. Federal brownfields legislation must ensure that builders and developers receive liability protections as a means to provide incentives for the development of these sites. Furthermore, builders and developers must be assured that EPA will not take an enforcement action unless a clear and limited set of circumstances warrants federal action. Without these incentives and protections, builders and developers will remain skeptical of acquiring and remediating brownfield sites.

It is my firm belief that the Gillmor June 13th Discussion Draft provides builders and developers with the necessary incentives to tackle these sites while ensuring the federal "safety net." While S.350 and the Democratic Discussion Draft provide certain important elements toward that end, these bills will not encourage the development community to redevelop brownfield sites. The exclusion of meaningful liability protection for prospective purchasers under RCRA, the exclusion of federal enforcement protections for petroleum contaminated sites remediated under a state program, the failure to provide protection to future owners and tenants, and the standardless reopeners do not strike an appropriate balance between providing certainty, finality and liability protection to brownfields developers. I encourage the members of this subcommittee to join with Chairman Gillmor and move forward on enacting his meaningful, workable, brownfields proposal.

Again, I am grateful for this opportunity to appear before you on this important issue. I look forward to working with all members of the subcommittee. Thank you.

Mr. GILLMOR. Thank you very much.
Mr. DeMarco?

STATEMENT OF DANIEL R. DeMARCO

Mr. DeMARCO. Thank you. Thank you for the opportunity to present the National Association of Industrial and Office Properties' views on Senate 350, the Gillmor discussion draft, and the Democratic discussion draft. I wish to thank Chairman Gillmor, ranking member Mr. Pallone, and members of the subcommittee for their leadership on this important issue. I am honored to be here.

My name is Dan DeMarco, and I am a member of the National Association of Industrial and Office Properties, NAIOP, and currently serve as NAIOP's national vice chairman of government affairs. In 2002, I will become NAIOP's national chair-elect. I am currently a partner with Campanelli Companies in Boston, Massachusetts. We are a family owned, commercial real estate company that was established in 1947.

Our company has developed over 12.5 million square feet of commercial property, including a number of sites involving environmental challenges. NAIOP is the Nation's leading organization of developers, investors, and owners of commercial real estate. We provide support and guidance to over 10,000 members helping to create, protect, and enhance the value of commercial and industrial real estate and promote grass-roots public policy.

We also work with various public sector entities in helping to bring idle properties back into use. As the owners, purchasers, and developers of brownfields, our members have a vested interest in this legislative reform.

Brownfields hold an enormous amount of latent value for both the public and private sectors. Developing these sites can relieve growth pressure on local communities while at the same time having a profound effect on our urban core, yet this potential will remain unrealized unless Congress performs the Superfund liability system.

Liability for cleanup of brownfield sites arises under the Federal Superfund statutes and similar State laws. Liability under the Superfund is joint and several. That is, each potential responsible party bears the entire responsibility for all cleanup expenses. The Superfund liability scheme has clearly exacerbated the difficulty of bringing brownfields back to productive use and may itself be responsible for the creation of many of these sites.

NAIOP has testified before Congress in the past on the issue of brownfields reform, and we continue to maintain there are five key practical elements for revitalization. No. 1, reform the Superfund liability system. Two, defer to State remediation programs. Three, cleanup standards that are specific, risk-based, and take into account future use. Four is liability risks that can be quantified. And five is recognition of market forces.

Our analysis of these three bills leads NAIOP to conclude that each makes individual attempts to address our concerns. We hope that these issues can be collectively addressed in a broad, bipartisan manner. Brownfields redevelopment result from a complex economic process dominated by real estate issues.

As Tip O'Neill used to say, all politics is local, and is likewise true for real estate. A Federal cookie cutter approach for brownfield development is insufficient to achieve the goals of improving the environment, rebuilding our urban cores, reducing sprawl, and increasing employment, and returning unproductive properties to State and local tax bases.

The U.S. Conference of Mayors estimates there are more than 500,000 brownfield sites nationwide. It is reasonable to speculate that as many as half of these are petroleum sites.

We applaud the Gillmor draft for including this type of lesser contamination in the general definition of brownfield. We are also encouraged by Senate 350 and the Democratic draft which both allow the use of brownfield grant and revitalization loan funds to be used for environmental assessments and cleanup activities of petroleum contaminated sites.

All three bills provide some form of protection from the liability to innocent landowners, contiguous property owners, and prospective purchasers. To qualify for this protection, Mr. Gillmor's draft, an innocent owner or a bona fide purchaser would deliver to make—would have to make due diligence inquiries under the American Society of Testing Material Standards.

On the other hand, Senate 350 and the Democratic draft would complicate this process for acquiring an EPA rulemaking. We believe the Gillmore draft provides a simple, workable approach. All three bills allow EPA to impose a lien on the increase of the property value, and we are not sure if this is a useful approach.

I see time is winding down here, so I would like to make one general comment with regard to our company's enactment with State

legislation, particularly in Massachusetts, the mass contingency plan.

We have been involved in up to six sites that have had some level of investigation and remediation, and we have had very positive results. We have removed tank farms. We redeveloped at the Devons Air Force Base—military base in Western Mass—the first private installation. It was a building leased to Gillette.

And without the cooperation of both the Federal Government and the State government, Gillette would not have come in 5 years ago to lease this building, and that military base would not have been redeveloped the way it has been.

There was a Federal indemnity achieved in that case, as well as a State covenant not to sue. And the State mass contingency plan has worked very well in self-policing and really leveraged tens of millions of dollars in private investment to remediate sites. Our company—millions of dollars.

Thank you.

[The prepared statement of Daniel R. DeMarco follows:]

PREPARED STATEMENT OF DANIEL R. DEMARCO, PARTNER, CAMPANELLI COMPANIES,
ON BEHALF OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES

Mr. Chairman, Ranking Member Pallone and Members of the Subcommittee: I greatly appreciate the opportunity to present NAIOP's views on S. 350, the "Gillmor Discussion Draft" and the "Democratic Discussion Draft" to the Subcommittee. First, I want to thank Subcommittee Chairman Gillmor, Congressman Pallone and members of the subcommittee for their hard work and their recognition of the importance of this issue. It is an honor to be a part of this discussion.

My name is Daniel R. DeMarco. I am a member of the National Association of Industrial and Office Properties (NAIOP) and currently serve as NAIOP's National Vice-Chairman of Government Affairs. In 2002, I will become the National Chairman-elect of NAIOP.

I am a partner in Campanelli Companies in Braintree, Massachusetts. Campanelli is a family owned commercial real estate company in business since 1947 and employing approximately 50 people. Our company has developed over 12.5 million square feet of commercial property primarily in Massachusetts and manages a 5.4 million square foot commercial real estate portfolio. A number of sites we have developed in the greater Boston area have involved a variety of environmental issues. Today, Campanelli is an active development, construction, acquisition and property management real estate company. Prior to joining the Campanelli Companies in 1989, I was an Associate with the Boston, Massachusetts law firm of Burns and Levinson, where I specialized in corporate law, and from 1982 to 1984, I served as a legislative assistant to former U.S. Representative Brian Donnelly (D-MA).

NAIOP is the nation's leading organization of developers, investors, and owners of commercial real estate. NAIOP provides support and guidance to its over 10,000 members nationally to help create, protect, and enhance the value of commercial and industrial real estate, as well as promotes grassroots public policy related to real estate development. Among its numerous activities, NAIOP works with various public sector entities—particularly local government and regional economic and industrial development agencies, authorities, and corporations—in helping to bring unused or underutilized properties back as productive sources of jobs and tax revenues back to communities. As the owners, purchasers, and developers of brownfields, our members have a keen interest in legislative efforts aimed at renewal of these properties.

Further, as the owners and developers of commercial and industrial properties subject to regulation under a variety of federal and state environmental laws, NAIOP members have much at stake in efforts to reform the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly known as "Superfund" or "CERCLA."

THE SUPERFUND LIABILITY SCHEME AND THE CREATION OF BROWNFIELDS

A brownfield is any real property that, because of actual or suspected environmental contamination, may lie idle, unoccupied, underutilized, or unused. The con-

tamination of these properties may stem from activities that took place or conditions that arose before current ownership and operation of the property, and as a result of lawful non-negligent conduct. In most, if not all, instances, a brownfield will not be the subject of an active investigation, remedial or enforcement action by the U.S. Environmental Protection Agency (EPA), or a state environmental agency.

Liability for cleanup of these sites arises under the federal Superfund and similar state statutes, and extends to all past and current owners and operators of the property and to any party responsible for generating or transporting any hazardous substances requiring cleanup at the property. Liability under this scheme is “joint and several,” i.e., each potentially responsible party (PRP) bears the entire responsibility for all remedial expenses to a person who cleans up a site, notwithstanding the amount or nature of contamination for which the PRP may be individually responsible. Allocation among PRPs usually takes place in lawsuits or in other adversary contexts in which the PRPs seek equitable contribution among themselves.

The Superfund liability scheme has clearly exacerbated the difficulty of bringing brownfields back to productive use. Moreover, that liability scheme itself is responsible for the creation of many brownfields. This system makes the owners of contaminated properties liable for millions of dollars in cleanup costs even if they had nothing to do with contaminating the site or they purchased the property decades after the contamination occurred. It exposes landowners not only to Superfund actions by EPA, but also to lawsuits decades in the future by as-yet unanticipated parties who incur cost to clean up the property. Concerned about this “trailing” liability, owners of possibly contaminated properties often hold this land back from the market. When properties that carry the stigma of contamination become available for sale, most developers avoid them out of concern that they will be exposed to endless uncertainty and undue financial liability.

LEGISLATIVE REFORMS ARE NEEDED

Brownfields hold enormous potential value for both the private and public sectors. This potential will remain unrealized, however, unless Congress reforms the Superfund liability system.

In April 1997, and again in May 1999, NAIOP had the privilege to testify before Congress on legislation aimed at Superfund reform and Brownfields revitalization. In that testimony, we pointed to five elements that NAIOP views as necessary to achieve meaningful Superfund reform that will result in practical brownfields revitalization: (1) Reform of the Superfund liability system; (2) Deference to state voluntary remediation programs; (3) Cleanup standards that are site specific, risk based, and which take into account future use; (4) Liability risks that can be quantified with solutions that are final; and (5) Recognition of market forces.

Our analysis of these bills leads NAIOP to conclude that the “Gillmor Discussion Draft,” S. 350, and the “Democratic Discussion Draft” make individual attempts to address our members concerns on these important issues. We hope that these issues outlined above can be addressed in a broad bi-partisan manner.

BROWNFIELD CLEANUP AND REDEVELOPMENT IS PART OF AN ECONOMIC PROCESS

Redevelopment of any brownfield property results from a complex economic process dominated by real estate issues. A developer will not be attracted to the most environmentally pristine of properties—whether urban, suburban, exurban, rural, or agricultural—if the property does not have economic potential. A developer will consider the inhibition to investment posed by a property’s environmental contamination as it would similar inhibitions, such as the availability of infrastructure, work force, tax issues, and other factors.

We have heard the phrase “all politics is local.” It is likewise true that all real estate is local. To quote a 2001 guidebook on brownfields development forwarded by former Clinton Administration EPA Assistant Administrator Tim Fields, “State-level creativity and innovation in meeting a wide range of brownfield site assessment, cleanup, and financing needs has been the hallmark of [brownfields reuse].”

Therefore, a federal “cookie cutter” approach for brownfield development is insufficient to achieve the lofty goals of improving the environment, rebuilding our urban cores, reducing sprawl, increasing employment, and returning unproductive properties to state and local tax bases. Both S. 350 and the “Gillmor Discussion Draft” recognize that voluntary cleanup programs of the various states provide the best mechanisms to achieve these goals. By identifying the benefit of these programs, these bills address the five elements referred to above.

(1) Title I—Brownfields Revitalization Funding

The U.S. Conference of Mayors estimates that there are more than 500,000 brownfield sites in the United States. It is reasonable to speculate that as many as half or more of these sites could be old gas stations. We applaud the “Gillmor Discussion Draft’s” effort to expand the definition of brownfield sites to include the less contaminated petroleum sites regulated by the Resource Conservation and Recovery Act. Further, we are encouraged by S. 350 and the “Democratic Discussion Draft’s” efforts to permit the use of grant and loan proceeds to implement environmental assessments and undertake cleanup of petroleum contaminated sites.

(2) Title II—Liability Clarifications

All three bills provide some form of protection from liability to innocent landowners, contiguous property owners, and bona fide purchasers of contaminated properties, all of which would mitigate some of Superfund’s most draconian provisions. In order to qualify for this protection under Mr. Gillmor’s draft, an innocent owner and a bona fide purchaser would have had to make inquiries for diligence investigations under the standards of the American Society of Testing of Materials (ASTM), the industry standard of both the commercial real estate and banking industries. For properties acquired before the promulgation of the ASTM standards, the party would have had to demonstrate compliance with contemporary industrial standards. The procedure in S. 350 and the “Democratic Discussion Draft” would require a complex EPA rulemaking and add uncertainty to a process that the free market and the most rigorous watchdog—the banking industry—have found effective. We support the provision in S. 350 and the “Democratic Discussion Draft,” but believe that the “Gillmor Discussion Draft” provides a more simple approach.

The “windfall lien” provision of both S. 350 and the “Democratic Discussion Draft” allow EPA to impose a lien on the increase in value of the property to the extent of EPA’s unrecovered cleanup costs. It does not, however, impose an obligation on EPA to attempt to recover these costs from PRPs. In contrast, the “Gillmor Discussion Draft” recognizes the need to require EPA to follow its own “Polluter Pays” policy before it imposes a lien on an innocent party. It requires that before EPA seeks to recover its costs from a bona fide purchaser it must first make reasonable attempts to recover those costs from one or more responsible parties.

Regrettably, however, none of the bills recognize the inherent unfairness of imposing an open-ended lien that has no time limitations, either for filing or duration. Under none of the bills would a bona-fide purchaser have notice of an EPA lien. Further, the EPA has the option to impose its lien at any time. Any lien imposed by the EPA should be recorded at the time the Agency performs its work at the affected property. This would be consistent with CERCLA Section 107(l), which already establishes a federal lien to secure the Agency’s remedial costs on property “affected by a removal or remedial action.” A notice provision would inform a prospective purchaser that EPA might seek to recover proceeds from the property after its acquisition. Such a notice provision is essential to fairness. The unintended effect, however, of any lien provision applying to a bona fide purchaser would be to discourage the development of properties on which EPA has filed its lien. Thus, NAIOP strongly believes that any lien EPA has filed should be released upon purchase of the property by a bona fide purchaser. Again, we do not know if this was the true intention of the bill’s authors.

(3) Title III—State Response Programs

Of critical importance to the cleanup and redevelopment of brownfields properties is the effective deferral of Federal enforcement in situations where properties have been cleaned up in compliance with State programs.

Since the early 1990s, 47 states have enacted legislation or otherwise established programs that provide releases from liability under state environmental laws for parties who successfully complete voluntary and mandatory remediation actions. The “Gillmor Discussion Draft” requires EPA to defer to such state programs, and it would provide statutory protection against both cost recovery and contribution actions by the federal government or private parties for persons who meet the requirements of those programs.

On the other hand, state governments would still be allowed to pursue Superfund claims under CERCLA section 107. This deferral to the state programs in the “Gillmor Discussion Draft” also provides an element of finality to site closure that is now missing from the Superfund site cleanup equation.

The example of states like Massachusetts, New Jersey, Pennsylvania, Michigan, Indiana, and others with voluntary cleanup programs, bolster the view of state program success. Many of these states have developed cleanup standards keyed to site use and risk and require enforceable deed restrictions and notices that convey with

the property if it is not cleaned up to residential standards. If the use changes, the protection from liability lapses.

In Pennsylvania, for example, NAIOP actively participated in the legislative process that resulted in Act 2, the Land Recycling and Environmental Remediation Standards Act. Under that statute, parties may choose to clean up contaminated properties to one or more of three different levels, after which they receive a release from liability under state environmental laws. The remediation standards of Act 2 apply both to voluntary cleanups and mandatory remedial actions under the state's version of Superfund. The Pennsylvania statute has resulted in the cleanup of more than 650 sites since 1995, and has been adopted as model legislation by the American Legislative Exchange Council, an organization representing by legislators from all 50 states.

It is important to recognize that states have been at the forefront of brownfields redevelopment and cleanup, while EPA has been slower to catch up. NAIOP urges Congress to not attempt to federalize the state programs, or make states meet a standard issued by EPA to qualify for deferral of EPA Superfund enforcement. It would be more logical and productive to require EPA to study and emulate the most successful state programs in order to redesign its own Superfund enforcement strategies. For example, the "Gillmor Discussion Draft" somewhat achieves this by emulating a provision in Pennsylvania's Act 2 Section 902 (35 P.S. Sec. 6026.902) which eases requirements for permits or permit revisions for cleanup actions taken in compliance with the statute. Section 303 in Title III of the "Gillmor Discussion Draft" requires EPA to promulgate regulations within 18 months that would streamline, minimize, or eliminate procedural permitting requirements. This suggestion recognizes the extraordinary need to bring our brownfield sites back to life and to overcome impediments that would counter the attractiveness of the program.

The extent to which the EPA may reopen for liability the remediation of a property cleaned up under a state program has been controversial. It is essential to understand that there are two groups affected by this: (1) Owners of thousands of contaminated properties that have not been released for sale, and (2) Parties who would clean up and redevelop these and thousands of other contaminated properties. These groups have not done so because of concern that they will face a future of lurking federal liability.

As the "Gillmor Discussion Draft" recognizes, this applies not only to EPA enforcement actions, but also to third party suits for contribution under Section 113 of Superfund. Indeed, while we are not aware of EPA having yet sought to take an enforcement action at a site that has undergone a state approved cleanup, there are legions of third party suits for cleanup. The threat of liability for contamination found many years after cleanup by detection techniques that have not yet been developed lurks under Superfund. Both site owners and developers need the assurance of finality on both EPA and third party enforcement actions.

The "Gillmor Discussion Draft" also recognizes that while EPA should be able to take action to protect human health and the environment where state programs have failed to do so, the Agency should first give the states the opportunity to cure any defect for which EPA can give them notice. Moreover, the draft actually enhances the likelihood of cleaning up more brownfields by requiring EPA to reopen state decisions only where true emergencies exist. Using the boilerplate "imminent and substantial endangerment standard" for reopening provides very little protection from second-guessing. Under the statutes, which have imminent and substantial endangerment provisions, courts have given a very broad interpretation to the term and have allowed actions to go forward where the problems were much less than crises or emergencies.

In *B.F. Goodrich v. Murtha*, (1988) 697 F. Supp. 89, for example, the court held that the "imminent and substantial endangerment" provision of CERCLA Section 106, which authorizes EPA abatement actions, is not limited to emergency situations, and that EPA may act even where the actual harm may not be realized for years. EPA's own guidelines as to what constitutes an imminent and substantial endangerment are skimpy, and EPA has interpreted its authority broadly.

In *United States v. Tarkowski*, 248 F.3d 596, a case decided by the U. S. Court of Appeals for the Seventh Circuit earlier this year, Judge Posner criticized EPA's claim that an imminent and substantial endangerment existed to justify its authority to take a response action under CERCLA Section 104. Judge Posner said (at 599):

"The EPA takes the extreme position that, provided it has probable cause to believe that there is even a thimbleful of a hazardous substance spilled in a person's yard, or we suppose even a drop, it has an absolute right to an access order..."

Judge Posner was particularly critical that EPA would seek “to undertake remedial efforts before determining whether there is a hazard that justifies the efforts.” 248 F.3d at 601. Authorizing EPA to take action at sites cleaned up under state programs only in true emergencies where the state has sufficient notice to cure any noted problem should avoid this unnecessary over-reaching by EPA.

The sensible restrictions on EPA second-guessing in the “Gillmor Discussion Draft” gives due credit to the states that have been on the firing line of brownfields redevelopment and encouragement to the developers who want to use those programs. At the same time these provision do not sacrifice protection of human health and the environment. We need to recognize that most developers, their employees, families, and other loved ones live in the communities where they work. It is cynical at best to project that states will try to cut environmental protection in order to attract development. In the unlikely event that such a circumstance would occur, the “Gillmor Discussion Draft” provides adequate ability for EPA to act swiftly and effectively to counteract such misconduct.

(4) Title IV of “Democratic Discussion Draft”—Advisory Commission

We applaud the inclusion in the “Democratic Discussion Draft” of a provision that would authorize a study of the effect of brownfields development on Environmental Justice issues. We concur that all communities should share in the benefits of such activity and that the Commission appointed under Title IV should both monitor compliance with this goal and issue recommendations to implement the goal. The Commission should not, however, have the unprecedented authority to disenfranchise state cleanup programs, as the Draft would empower it to do. This provision is probably unconstitutional as a violation of due process of law and the restriction of the 10th Amendment to the Constitution.

SUMMARY

Cleaning up real or perceived contamination will not assure the success of a brownfields remediation. Additionally, the ordinary factors that make real estate development work must be in place for a brownfield development to succeed. Hence, brownfields revitalization incentives must be market-driven. Location, accessibility, infrastructure, work force, demand, and other factors must be taken into account when allocating grants and other financial resources to brownfield revitalization efforts. Even public and non-commercial projects must make economic sense. The “Gillmor Discussion Draft” builds upon the substantial foundation provided in S. 350, which NAIOP supported. We believe that the “Democratic Discussion Draft” attempts to address some of the same problems, but just does not go far enough.

NAIOP members maintain that brownfields can and should be redeveloped consistent with protection of the environment and human health. Failure to enact brownfields reform legislation will result in the creation of more brownfields, as well as continue to foster the current inhibitions to brownfield redevelopment. Such outcomes are unilaterally inconsistent with protecting the environment and human health. The committee has an unparalleled, historic opportunity this year to take advantage of Congressional momentum, as well as fulfill the private sector’s desire to enact this important legislation.

Congress should act before this window of opportunity closes. Enacting broad bipartisan brownfields reform legislation would result in both greater environmental remediation and the creation of wider economic opportunity in redeveloped brownfield sites.

Mr. Chairman, Congressman Pallone, and members of the Subcommittee, I again thank you for the opportunity to present NAIOP’s views on brownfields reform legislation, specifically S. 350, the “Gillmor Discussion Draft” and the “Democratic Discussion Draft.” NAIOP understands that there will be a long discussion over certain policy components of this legislation; after all, legislation is the art of compromise. We feel that S. 350 and both drafts discussed here today will involve all interested parties in continuing the important dialog that began many years ago. We appreciate your collective efforts as you work to obtain a broad bipartisan consensus on how to move forward in passing brownfields reform. Ultimately your efforts will be successful. NAIOP looks forward to working with the committee to that end.

Thank you.

Mr. GILLMOR. Thank you.

Mr. Lynch?

STATEMENT OF JOHN LYNCH

Mr. LYNCH. Thank you for the opportunity to present the views of the National Association of Realtors on brownfields, and I wish to thank Chairman Gillmor and ranking member Pallone for your leadership in addressing this very important issue. I would like to thank my friend, Sherrod Brown, for the nice introduction before.

My name is John Lynch. I own a full-service real estate company, commercial real estate company in Cleveland, Ohio. We offer brokerage, site location, consulting, management, and appraisal services. I also have a small building company. We build energy efficient homes.

I have been licensed in real estate since 1972. And, as Sherrod said, I was a member of Cleveland City Council. I have done my stint in public service. It is often said, and I agree, that realtors don't sell homes or buildings; we sell communities. The more than 760,000 members of the National Association of Realtors, real estate professionals involved in all aspects of the real estate industry, are concerned and active members of all of our communities.

Like everyone else, we want clean air, clean water, and clean soil. We want to see contaminated properties cleaned up and returned to the marketplace. We care about a healthy quality of life, as well as a vibrant economy, and we are willing to do our part to maintain that important balance.

NAR holds the brownfield legislation as our No. 1, as our top environmental issue, as our top priority. NAR supports brownfield legislation which will effectively promote the cleanup and redevelopment of hundreds of thousands of our Nation's brownfield sites. And if the chairman indicates there is 10,000 in Ohio, there is about 2,500 in my marketplace then.

Throughout the country the real estate industry is becoming increasingly comfortable with the idea of redeveloping brownfield sites. Old factories and warehouses are being replaced with cultural facilities, parks, apartment communities, shopping centers, what we heard earlier. At the same time that they provide a cleaner and safer environment, these revitalized sites increase the tax base, they create jobs, and they provide for new housing.

Support for brownfield development also fits with NAR's smart growth initiative—our new program to advocate public policies which seek to maintain community quality of life while allowing the market forces to generate growth. Brownfields redevelopment is occurring because Federal, State, and local governments have banded together to creatively attack the brownfields problem by providing a variety of incentives and assistance. It just makes sense to redevelop these sites.

In a report published last year, the State of Ohio reports that 85 sites have entered our voluntary action program resulting in the creation of over 7,000 jobs. Ohio recently passed a \$400 million bond issue with half of the money being devoted for the cleanup of brownfield sites, for innocent property owners and prospective purchasers.

New Jersey—a Rutgers University report estimates that within 10 years brownfields redevelopment can create 66,000 permanent jobs, housing for some 71,000 people, and some \$62 million in new tax revenues. However, significant hurdles still remain.

From the real estate industry perspective, liability concerns continue to impede brownfield development. First and foremost, brownfield legislation must provide Superfund liability protection for innocent landowners and prospective purchasers who have not caused or contributed to the hazardous waste contamination on the properties.

It is important to get these innocent property owners out of the liability net, so that resources can be targeted toward the cleanup rather than toward litigation.

Second, brownfields legislation must recognize successful cleanups conducted under State brownfield programs. Through their programs, most of the States provide real estate owners and developers with incentives to make brownfields redevelopment more attractive. Typically, the State will provide some sort of—some form of liability relief once it has approved a cleanup.

In Ohio, the relief comes in the form of a no further action letter from the State EPA. Unfortunately, there is no guarantee, despite what was mentioned earlier by Ms. Fisher, that the Federal EPA will not assert its authority at some future date and require some additional cleanup.

Without some degree of certainty that they are protected from the Federal as well as from State liability, owners and developers are reluctant to undertake development of contaminated sites. For this reason, the Ohio program is underutilized. In conjunction with the creative leadership of Administrator Whitman, I am confident that Congress can craft and pass legislation providing the real estate community with the certainty that they can go forward.

Practical and effective brownfield legislation presents a win-win opportunity for everyone by cleaning up hazardous waste sites, thereby allowing them to be put to new productive uses which can enhance the community growth and the quality of life.

In light of the strong support for brownfield legislation in the administration and in the Senate, the House has now a unique opportunity to take up the gauntlet and to reinforce a nationwide effort to turn brownfields into greenfields. NAR looks forward to working with this committee and the entire House to pass a brownfields bill in the 107th Congress.

Thank you very much for allowing me to participate with you and to share with you the views of the National Association of Realtors.

[The prepared statement of John Lynch follows:]

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS®

Thank you for the opportunity to present the views of the National Association of Realtors® (NAR) on brownfields. I wish to thank Chairman Gillmor and Ranking Member Pallone for your leadership in addressing this very important issue.

My name is John Lynch. I own a full service commercial real estate company in Cleveland, Ohio, offering brokerage, site location, consulting, management and appraisal services. I have been licensed in real estate since 1972. I also served on the Cleveland City Council for 12 years.

It is often said—and I agree—that Realtors® don't sell homes, we sell communities. The more than 760,000 members of the National Association of Realtors®, real estate professionals involved in all aspects of the real estate industry, are concerned and active members of our communities. We want clean air, clean water and clean soil. We want to see contaminated properties cleaned up and returned to the marketplace. We care about a healthy quality of life as well as a vibrant economy, and we are willing to do our part to maintain that important balance.

NAR supports brownfields legislation which will effectively promote the cleanup and redevelopment of the hundreds of thousands of our nation's brownfields sites. Throughout the country, the real estate industry is becoming increasingly comfortable with the idea of redeveloping brownfields sites. Old factories and warehouses are being replaced with cultural facilities, parks and apartment communities. At the same time that they provide a cleaner and safer environment, these revitalized sites increase the tax base, create jobs and provide new housing.

Support for brownfields redevelopment also fits within NAR's Smart Growth Initiative, our new program to advocate public policies which seek to maintain community quality of life while allowing market forces to generate growth.

Brownfields redevelopment is occurring because federal, state and local governments have banded together to creatively attack the brownfields problem by providing a variety of incentives and assistance.

In a report published last year, the State of Ohio reports that 85 sites have entered our Voluntary Action Program, resulting in the—creation of over 7,000 jobs. Ohio recently issued a \$400 million bond, with half of the money devoted to brownfields cleanup. In New Jersey, a recent Rutgers University report estimates that—within 10 years—brownfields redevelopment can create 66,000 permanent jobs, new housing for 71,000 people, and \$62 million in new tax revenues.

However, significant hurdles remain. From the real estate industry perspective, liability concerns continue to impede brownfields redevelopment.

First and foremost, brownfields legislation must provide Superfund liability protection for innocent landowners and prospective purchasers who have not caused or contributed to hazardous waste contamination. It's important to get these innocent property owners out of the liability net so that resources can be targeted toward cleanup rather than litigation.

Secondly, brownfields legislation must recognize successful cleanups conducted under state brownfields programs. Through their programs, most of these states provide real estate owners and developers with incentives to make brownfields redevelopment more attractive.

Typically, the state will provide some form of liability relief once it has approved a cleanup. In Ohio, relief comes in the form of a "No Further Action" letter from the state EPA. Unfortunately, there is no guarantee that the federal EPA will not assert authority at a future date and require additional cleanup.

Without some degree of certainty that they are protected from federal as well as from state liability, owners and developers are reluctant to undertake development of contaminated sites. For this reason, Ohio's program is underutilized. In conjunction with the creative leadership of Administrator Whitman, I'm confident that Congress can craft and pass legislation providing the real estate community with the certainty they need to go forward.

Practical and effective brownfields legislation presents a "win-win" opportunity for everyone by cleaning up hazardous waste sites, thereby allowing them to be put to new and productive uses which enhance community growth and quality of life.

In light of the strong support for brownfields legislation in the Administration and the Senate, the House has a unique opportunity to take up the gauntlet and reinforce our nationwide effort to turn "brownfields" into "greenfields." NAR looks forward to working with this Committee and the entire House to pass a brownfields bill in the 107th Congress.

Thank you again for the opportunity to present the views of the National Association of Realtors®. I'm happy to answer any questions.

Mr. GILLMOR. Thank you, Mr. Lynch.
Mr. Roth?

STATEMENT OF LARRY ROTH

Mr. ROTH. Good afternoon, Mr. Chairman, Congressman Pallone, and members of the subcommittee. My name is Larry Roth. I am a registered professional engineer in six States, and a registered geotechnical engineer in California with 30 years of experience in consulting civil, environmental, and geotechnical engineering.

Currently, I am the Assistant Executive Director and Chief Operating Officer of the American Society of Civil Engineers. The cleanup of brownfields is important to the environmental and industrial health of this Nation through revitalization of many of our urban

areas. We commend the subcommittee for its effort to produce bipartisan brownfields legislation.

ASCE strongly encourages Congress to pass legislation that would assist in the redevelopment of brownfields. These sites, left untended, impose significant costs on the entire society. Properly restored, they aid in the revival of blighted areas, promote sustainable development, and invest in the Nation's industrial and economic strength.

As blighted urban land is restored to productive use, the pressure to develop greenfields is lessened. This mitigates undesirable effects of sprawl such as traffic congestion and preserves culturally and ecologically valuable land.

I should state at the outset that ASCE supports the carefully negotiated bipartisan brownfields approach taken in S. 350, including its funding, liability, and finality provisions. Significant to the effort to renew brownfields, in our view, is the provision that S. 350 that would limit any Federal response at State brownfield sites to current or future releases with certain important exceptions.

These exceptions would allow Federal enforcement only, one, at the state's request; two, in the event of a release across a State line or onto Federal property; three, if the EPA determines that an imminent and substantial endangerment to public health or the environment exists; or, four, if the agency determines that the site conditions warrants attention and that further remediation to protect public health or the environment.

We believe that this narrowly crafted, bipartisan approach to the reopener question in S. 350 is the best way to address the dynamics of the Federal-state partnership in brownfield cleanups. The Senate compromise adequately balances the interest of property owners and developers, the States, and the Federal Government in the cleanup process, while also assuring that human health and the environment are protected to the maximum extent practicable.

We should point out that the Bush Administration endorsed this compromise in Federal-state power-sharing before the subcommittee in March. We think that the finality provisions in the June 13 draft bill go well beyond the compromise crafted by the Senate. It would limit Federal authority to act at brownfield sites under CERCLA and under other Federal laws as well.

Congress should not limit EPA's authority to respond under CERCLA or other authorities to actual or threatened releases of hazardous substances at brownfields that have been cleaned up by a State. This is important because there can often be little meaningful State review during the cleanup process itself. Some States require developers to enter into enforceable consent agreements. Others involve the State extensively in approving work plans and supervising the cleanup process.

Most States, however, allow the developer to operate more or less independently with little or no oversight beyond a review of documentation submitted at the end of remediation activities. The brownfields program needs a Federal umbrella to ensure human health and the environment are not left threatened by inadequate State cleanup efforts.

In fact, to make sure there is a uniform and protective cleanup effort nationally, we believe that the final brownfields legislation

should establish minimum Federal criteria for assessing the adequacy of State brownfields programs.

In conclusion, CERCLA currently lacks certain liability exemptions for brownfields redevelopment. We believe liability relief provisions in the Senate bill offer innocent landowners, contiguous landowners, and prospective purchasers a good deal of certainty while continuing to afford appropriate protection and safeguards to human health and the environment.

Mr. Chairman, that concludes my testimony. Thank you for inviting me here today. I would be happy to answer any questions that you may have.

[The prepared statement of Larry Roth follows:]

PREPARED STATEMENT OF LARRY RPTH, EXECUTIVE DIRECTOR, AMERICAN SOCIETY OF CIVIL ENGINEERS

Mr. Chairman, Congressman Pallone and Members of the Subcommittee—Good morning. My name is Larry Roth. I am a professional engineer and the assistant executive director and chief operating officer of the American Society of Civil Engineers (ASCE). I appreciate the opportunity to appear before this subcommittee on behalf of ASCE to present our views on legislation aimed at restoring the economic and social potential of brownfields sites.

ASCE was founded in 1852 and is the country's oldest national civil engineering organization. It represents more than 125,000 civil engineers in private practice, government, industry and academia who are dedicated to the advancement of the science and profession of civil engineering. ASCE is a 501(c)(3) non-profit educational and professional society.

A. THE NEED FOR ACTION

The cleanup of brownfields is important to the environmental and industrial health of this nation through the revitalization of many of our urban areas. We commend the Subcommittee for its efforts to produce bipartisan brownfields legislation.

ASCE strongly encourages Congress to pass legislation that would assist in the redevelopment of brownfields. These lands have effectively have been removed from productive capacity due to serious contamination. These sites, left untended, impose significant costs on the entire society. Properly restored, they aid in the revival of blighted areas, promote sustainable development, and invest in the nation's industrial strength.

In 1995, the General Accounting Office estimated that there were more than 450,000 brownfield properties across America. Last year, the U.S. Conference of Mayors calculated that redeveloped brownfields could generate 550,000 additional jobs and up to \$2.4 billion in new tax revenue for cities nationwide.

ASCE believes that brownfields restoration, properly carried out, limits urban sprawl, thereby achieving a balance between economic development, the rights of individual property owners, the public interest, social wants and a healthy environment. Revitalized brownfields reduce the demand for undeveloped land. As blighted urban land is restored to productive use, the pressure to develop distant open spaces is lessened, thereby mitigating the undesirable effects of sprawl, such as traffic congestion, and preserving culturally and ecologically valuable land.

The current brownfields program was established by the Environmental Protection Agency (EPA) in 1993 under its general Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) authority. That program, which has expanded to include more than 300 brownfields assessment grants (most for \$200,000 over two years) totaling more than \$70 million, needs to be placed on a sound statutory footing in order to ensure its continued progress.

B. BROWNFIELDS LEGISLATION IN THE 107TH CONGRESS

ASCE has reviewed S. 350, the Brownfields Revitalization and Environmental Restoration Act of 2001. This bill passed the Senate by a vote of 99-0 in April. ASCE supported S. 350 during its consideration in the Senate.

We also have reviewed two recent legislative proposals for brownfields that were produced by this Subcommittee. They are the Discussion Draft of June 13, 2001 (the Gillmor plan), and the Democratic Discussion Draft of June 20, 2001 (the Pallone plan).

Let me state that ASCE continues to support the carefully negotiated, bipartisan brownfields approach taken in S. 350, including its funding and liability provisions. Our detailed comments on specific issues follow.

C. THE ROLE OF THE STATES

States have long sought greater local control over the Superfund program generally. We know, of course, that states have differing authorities and ideas about brownfields cleanups. They have a wide range of approaches and policy tools. Some address brownfields through voluntary cleanup programs, others supplement their voluntary program activities, and still others have separate brownfields cleanup and redevelopment programs.¹

Forty-four states have initiated voluntary cleanup (or response) programs for brownfields. The site owner works cooperatively with the state. The private parties that voluntarily agree to clean up a contaminated site receive some protection from future state enforcement action at the site, often in the form of a “no further action” letter or “certificate of completion” from the state. These voluntary programs for brownfields are important because of the certainty that the EPA will not be able to complete the cleanup of even the nation’s worst hazardous waste sites alone.² But these state commitments do not, and should not, affect the EPA’s authority to respond to actual or threatened releases of hazardous substances under CERCLA.

In 1996, the EPA attempted to give the states a larger role in the brownfields process through an administrative mechanism that allows the Agency and the states to enter into “partnerships” to encourage the cleanup of sites that are not contaminated enough to warrant cleanup under Superfund itself.³ The policy set out six “baseline criteria” for the Agency to allow states to carry out voluntary cleanups at brownfield sites under a memorandum of agreement. Voluntary state cleanup programs must provide opportunities for meaningful community involvement; ensure that voluntary response actions are protective of human health and the environment; have adequate staff and financial resources to ensure that voluntary response actions are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures, where appropriate, are available from the state agency responsible for the voluntary cleanup program; provide mechanisms for the written approval of response action plans and a certification or similar documentation indicating that the response actions are complete; provide adequate oversight to ensure that voluntary response actions are conducted in such a manner to assure protection of human health and the environment; and show the capability, through enforcement or other authorities, of ensuring completion of response actions if the volunteering party carrying out the response action fails to complete the necessary response actions, including operation and maintenance or long-term monitoring activities.⁴

As of May 9, 2001, sixteen states had entered into a memorandum of agreement with the EPA under the 1996 voluntary cleanup program guidelines for brownfields, according to the Agency.⁵ In effect, these states have agreed to strict federal oversight of their brownfield cleanup programs in return for assurances from the EPA that the federal government will voluntarily curtail its powers under section 106(a) of CERCLA, which allows the Agency to override local cleanup decisions at a haz-

¹For a pointed comment on state voluntary cleanup programs, see Joel B. Eisen, *Brownfields Policies for Sustainable Cities* (9 DUKE ENVTL. L. & POL’Y F. 187, 207-208 (1999)) (“Often, there is also little meaningful [state] review during the remediation process itself. Some states require developers to enter into enforceable consent agreements; others involve the state extensively in approving work plans and supervising the cleanup process...Most allow the developer to operate more or less independently with little or no state oversight beyond a review of documentation submitted at the end of remediation activities.”)

²In 1998, the General Accounting Office reported that, of approximately 3,000 sites identified as possible National Priorities List (NPL) sites, only 232 were named by either EPA, a state, or both, as likely to be placed on the NPL.

³Memorandum from Elliott P. Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, and Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, to EPA Superfund National Policy Managers (Nov. 14, 1996).

⁴*Id.*, Attachment 1.

⁵The states are Arkansas (December 2000); Colorado (April 1996); Delaware (August 1997); Florida (December 1999); Illinois (April 1995); Indiana (December 1995); Kansas (March 2001); Maryland (February 1997); Michigan (July 1996); Minnesota (May 1995); Missouri (September 1996); New Mexico (December 1999); Oklahoma (April 1999); Rhode Island (February 1997); Texas (May 1996); and Wisconsin (October 1995).

ardous waste site after the cleanup is completed in cases of “imminent and substantial endangerment.”⁶

The EPA will not intervene in a state voluntary cleanup program absent a catastrophic failure of the initial cleanup. “[G]enerally EPA does not anticipate taking removal or remedial action at sites involved in this Voluntary Cleanup Program unless EPA determines that there may be an *imminent and substantial endangerment* to public, health, welfare, or the environment.”⁷

Section 301 of S. 350 adds a new section to CERCLA that effectively would codify the EPA policy and the Supreme Court holding in *Meghrig* by limiting any federal response at brownfield sites to current or future releases. It would preclude federal enforcement through section 106(a) or a cost-recovery action under section 107(a) following a state cleanup at a brownfield site, with four important exceptions. These exceptions would allow federal enforcement (1) at the state’s request; (2) in connection with migration across a state line or onto federal property; (3) if the EPA determines that an imminent and substantial endangerment to public health or welfare or the environment exists, after considering the response actions already taken at the site, and determines that additional response actions are likely to be necessary; or (4) if the Agency determines new information on the site’s condition warrants attention and the site presents a threat requiring further remediation to protect public health, welfare, or the environment. The Bush Administration endorsed this compromise in federal-state power-sharing before this Subcommittee in March.⁸

The Democratic Draft of June 20 generally follows the language in S. 350. It would preclude federal enforcement or cost recovery following a state brownfield cleanup, with the four exceptions affirmed in S. 350. The Gillmor Draft would adopt a somewhat more restrictive approach to reopeners, prohibiting the EPA or any other party from seeking a post-cleanup enforcement order under section 106, a cost recovery under section 107 or a civil action under section 113 of CERCLA. It would allow for federal or private enforcement under the same four exceptions included in S. 350 and the Democratic Draft, however.

The narrowly crafted bipartisan approach to the reopener question in section 301 of S. 350 is the correct way to address the natural tension between the federal and state roles in brownfields cleanups. This provision would give the states ample opportunity to carry out a brownfield cleanup under minimum federal oversight while protecting human health and the environment in case of a cleanup failure through the use of federal enforcement tools in the existing Superfund statute. This Subcommittee should conform its brownfields bill as nearly as possible to the Senate provision on reopeners.

D. STATE PROGRAM CRITERIA

In practice, state voluntary programs do not focus on redevelopment nor do they target urban sites specifically. State voluntary programs are more often aimed at getting simple, less contaminated sites cleaned up regardless of whether they are reused, and, as we have noted, they have differing authorities and ideas about brownfields cleanups. Brownfields programs, on the other hand, are more likely to focus on redevelopment and be part of a broader state strategy or set of social policies aimed at improving distressed urban areas.

The Democratic Discussion Draft would create a new provision that would require states to certify to the EPA that they have the legal and financial resources available to carry out a brownfields cleanup. The Gillmor Discussion Draft contains similar requirements. Each bill would codify the EPA practice of signing memoranda of agreement with states to carry out voluntary cleanup programs under Agency guidance. ASCE endorses this solution.

To ensure a uniform and protective cleanup effort nationally, we believe that the final brownfields legislation ought to establish minimum federal criteria for assessing adequate state brownfields programs. The states should be required to dem-

⁶ 42 U.S.C.A. § 9606(a) (West 2001). Known as the “reopener” clause, the “imminent and substantial endangerment” locution restricts federal action to current or future releases. It does not contemplate an EPA response for releases that occurred at some time in the past. See *Meghrig v. KFC Western Inc.*, 116 S.Ct. 1251, 1255 (1996).

⁷ Laws-Herman Memorandum, *supra* note 3, at 2 (emphasis added).

⁸ A *Smarter Partnership: Removing Barriers to Brownfields Cleanups: Hearing Before the Subcomm. on Environment and Hazardous Materials of the House Comm. on Energy and Commerce*, 107th Cong. (Mar. 7, 2001) (Statement of Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency) (“Brownfields legislation should direct EPA to work with the states to ensure that they employ high, yet flexible cleanup standards, and allow EPA to step in to enforce those standards when necessary.”) <<http://energycommerce.house.gov/107/hearings/03072001Hearing45/hearing.htm>>.

onstrate that their programs satisfy minimum environmental and public health criteria.

There also must be some way to ensure appropriate public participation in state cleanups or provide assurance through state review or approval that site cleanups are adequate. Public participation and accountability are important to making good cleanup decisions.

E. LIABILITY ISSUES

CERCLA currently lacks certain liability exemptions for brownfields redevelopment. Nevertheless, the EPA has undertaken several liability-related administrative steps to encourage brownfields development. Significantly, the Agency has allowed expanded use of "prospective purchaser agreements." These make up a "no-action assurance" by the EPA that it will not enforce against someone who wants to buy contaminated property for cleanup or redevelopment. There must be a clear benefit to EPA (often, obtaining cleanup funding not otherwise available) or to the community in entering into the agreement. Another initiative is the EPA "comfort letter," a notification to the prospective buyer of a brownfield (such as a closed military base) as to EPA's enforcement intentions there, based on information then known to EPA. Comfort letters are informational and not binding assurances, however, as the prospective purchaser agreements are.

These EPA policies, however, restrict only the Agency. They provide no assurance that states or private parties may not sue under the Act. Moreover, although some states, as part of their own brownfields programs, have provided protection from liability under state law as an incentive for investment in these sites, states are without power to waive liability under the federal CERCLA.

Thus, the fear of liability under CERCLA frequently impedes the cleanup and redevelopment of brownfields. We support liability provisions in CERCLA that release prospective purchasers of contaminated brownfields property; innocent landowners, and contiguous property owners from responsibility for the cleanup of a site. We believe liability relief provisions for innocent landowners, contiguous landowners and prospective purchasers will provide a great deal of certainty to homeowners, buyers, and developers involved in the purchase, sale, cleanup and redevelopment of brownfields properties. S. 350 and the two Subcommittee bills easily satisfy these requirements.

F. SCOPE OF THE LEGISLATION

We believe a federal brownfields restoration program should be narrowly tailored to conserve federal funds by addressing only those sites where no other federal or state cleanup actions are possible or under way.

To this end, the legislation should exclude from the brownfields restoration program any site that is undergoing a remedial or removal action funded under CERCLA or that is listed or proposed for listing on the NPL.

Other exclusions should apply to sites that are the subject of an administrative or court-ordered cleanup or a cleanup approved through a consent decree under CERCLA, the Resource Conservation and Recovery Act (RCRA), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA) or the Safe Drinking Water Act (SDWA).

Brownfields funding should not go to sites subject to corrective action under 3004(u) or 3008(h) of RCRA and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures.

Finally, no federal assistance should go for a hazardous waste disposal unit for which a closure notification has been submitted and that has closure requirements specified in a closure plan or permit under RCRA; a site that is federally owned or operated; any portion of a facility where there has been a release of polychlorinated biphenyls and that is subject to remediation under TSCA; or that is being addressed by the Leaking Underground Storage Tank (LUST) Trust Fund.

All three bills meet this important goal.

G. CONCLUSION

Mr. Chairman, that concludes our testimony. I would be happy to answer any questions you may have.

Mr. GILLMOR. Thank you very much, Mr. Roth.
Mr. Hopkins?

STATEMENT OF ED HOPKINS

Mr. HOPKINS. Thank you, Chairman Gillmor, and members of the committee for this opportunity to speak today on brownfields issues.

In addition to my statement, I would like to have introduced into the record a letter from seven public health and environmental groups concerning the discussion draft if we could.

Mr. GILLMOR. Give us a copy, and we will deal with that at the end of the hearing.

Mr. HOPKINS. Okay. Thank you, sir.

My name is Ed Hopkins. I am the Director of the Sierra Club's Environmental Quality Program. We are a national nonprofit environmental advocacy organization with more than 700,000 members. The Sierra Club strongly supports cleaning up brownfields in ways that protect public health and the environment and, to the greatest extent possible, hold polluters accountable for cleanup costs.

In our view, the majority draft bill takes the debate over how best to clean up and redevelop brownfields in the wrong direction. It represents a radical departure from the bipartisan bill that unanimously passed the Senate, Senate bill 350, with the support of EPA Administrator Whitman.

The draft bill promotes redevelopment above consideration of public health and the environment, fairness to taxpayers, and the right of citizens to know about and participate in decisions affecting their communities. The Sierra Club will vigorously oppose this bill as an unacceptable weakening of the Nation's public health protection laws.

We are afraid if the committee chooses this approach, which diverges so greatly from the bill passed in the Senate and the policies that the administration has espoused, we believe it will doom the prospect of enactment of brownfield legislation.

There are several principal areas of concern about this bill. First, the draft bill includes heavily contaminated sites within the definition of brownfields and eligible response sites. In our view, brownfields legislation should address sites with low levels of contamination.

One of the most important provisions of Senate bill 350 is that it includes only sites with relatively low levels of contamination, recognizing that higher risk sites should be addressed under the provisions of State and Federal laws specifically written to address the risks they pose to ensure protection of the public's health and safety.

In defining brownfield sites that would be eligible for Federal funding, the draft bill in several ways greatly expands the scope of brownfields and includes more contaminated sites. It allows portions of heavily contaminated sites subject to cleanup under a number of Federal laws to be considered as brownfields.

The definition of eligible response sites under the Senate bill explicitly excludes Superfund caliber sites. Those are included in the draft bill. The draft bill would also allow States to designate highly contaminated sites, including hazardous waste disposal sites in areas contaminated with PCBs as brownfields.

Allowing more higher-risk sites to take advantage of funding and enforcement limits under a State brownfield program greatly concerns us because of the inadequacy of some of the State programs. The Sierra Club strongly opposes the concept of, one, making high-risk sites eligible for funding in restricted Federal enforcement; two, reducing the enforcement authority of the Federal Government, thus leaving oversight largely to the States; and, three, failing to set minimum common-sense requirements for State cleanup programs. And this is precisely what this bill would do.

Our second major concern is that the draft bill fails to include criteria for State voluntary cleanup programs, and we see this program criteria as vital for ensuring protection of public health and environmental quality.

State cleanup programs vary tremendously. A dozen States, including Ohio, lack assurances for public participation in their cleanup program. In Ohio, for example, States are—the public is not notified of cleanup until after it occurs. These documented weaknesses of State programs suggest that limiting Federal enforcement authority while increasing Federal funding for State voluntary cleanup programs may result in increased health risks.

Our third major concern is that the draft bill weakens EPA's authority to protect public health and the environment from toxic waste. The Federal safety net in CERCLA and other statutes must be preserved to safeguard the public.

We see there is no real need to limit the Federal Government's authority in this area. As EPA Administrator Whitman has testified in the Senate, EPA has never superseded a State brownfields decision. Yet this draft goes a long way toward changing the provisions of S. 350, changing, for example, the standard of imminent and substantial endangerment by adding the concept of emergency.

So we have many concerns about this bill, Mr. Chairman, and we appreciate the opportunity to speak here today.

[The prepared statement of Ed Hopkins follows:]

PREPARED STATEMENT OF ED HOPKINS, SIERRA CLUB

Chairman Gillmor and members of the House Energy and Commerce Subcommittee on Environment and Hazardous Materials, thank you for the opportunity to speak today about Representative Gillmor's June 13 draft brownfields legislation.

My name is Ed Hopkins, and I am the director of the Sierra Club's Environmental Quality program. The Sierra Club is a national, nonprofit environmental advocacy organization with more than 700,000 members.

To summarize the Sierra Club's principal concerns, there are four main areas where Representative Gillmor's draft bill takes the debate over brownfields legislation in the wrong direction.

- First, the draft bill includes heavily contaminated sites within its definition of "brownfields" and "eligible response sites." Brownfields legislation should only address sites with low levels of contamination.
- Second, it fails to include minimum, commonsense criteria for state voluntary cleanup programs. Requiring minimum state program criteria is vital for ensuring protections of public health and environmental quality.
- Third, the draft bill weakens the EPA's authority to protect public health and the environment from toxic waste. The federal safety net in CERCLA and other statutes must be preserved to safeguard the public.
- Fourth, the draft bill eliminates a host of protections for local communities. These provisions include, but by no means are limited to, unnecessary restrictions on listing Superfund sites; efforts to allow the elimination of requirements for public notice, information, and participation in environmental permitting decisions; and removal of protections for public health embodied in CERCLA, RCRA and other laws.

OVERVIEW

Various estimates place the number of brownfields between 450,000 to 600,000. Under the EPA's broad definition—"abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination"—anything from a trash-strewn inner-city lot posing minimal health threats to sites that are just barely less hazardous than those listed on the National Priority List could be considered a brownfield.

The Sierra Club strongly supports cleaning up brownfields in ways that protect health and the environment and that, to the greatest possible extent, hold polluters accountable for cleanup costs. Responsible brownfields cleanup should reduce or eliminate public exposure to contaminants, protect the environment, revitalize communities, facilitate development that takes advantage of existing infrastructure, and discourage consumption of undeveloped land. Irresponsible brownfields redevelopment can pose risks to public health and the environment, disillusion and anger communities that have been denied opportunities to participate in redevelopment decisions, and decrease redevelopment efforts. Eagerness to redevelop contaminated property should not have a greater priority than protecting health.

In our view, Representative Gillmor's draft bill takes the debate over how best to clean up and redevelop brownfields in the wrong direction. It represents a radical departure from the bipartisan bill that unanimously passed the Senate (S. 350), with the support of EPA Administrator Whitman.

This draft bill promotes redevelopment above consideration of public health and the environment, fairness to taxpayers, and the right of citizens to know about and participate in decisions affecting their communities. The Sierra Club will vigorously oppose this bill as an unacceptable weakening of the nation's public health protection laws. If the Committee chooses this approach, which diverges so greatly from the provisions in the Senate bill and the policies the Administration has espoused, we believe it will doom the prospect for enactment of brownfields legislation, thereby slowing efforts to clean up and redevelop the nation's brownfields.

In the Sierra Club's view, draft bill contains a number of provisions that weaken public health protections and inappropriately shift liability for cleanup to the public. The draft bill:

Includes heavily-contaminated or high-risk sites in the definition of "brownfields" and "eligible response sites."

One of the most important provisions of S. 350 is that it includes only sites with relatively low levels of contamination. It recognizes that higher risk sites should be addressed under the provisions of state and federal laws specifically written to address the risks they pose to ensure protection of the public's health and safety.

In defining brownfield sites that would be eligible for federal funding, the draft bill in several ways greatly expands the scope of brownfields and includes more contaminated sites. It removes S.350's limitation that only "relatively low risk" petroleum sites be included as brownfield sites (S.350 Section 101(a)(39)(D)(ii)(bb)(AA)). It also allows portions of heavily contaminated sites subject to cleanup under a number of federal laws to be considered for brownfields funding. (Section 101(a)(39)(B)(iii) and (iv)) We are wary of drawing the lines too closely on highly contaminated sites because it suggests more precise knowledge of the site than may be accurate. In the Hickory Woods development of Buffalo, New York, for example, toxic chemicals have been found in an area just outside an NPL site. After chemicals were found in some basements, the state health department has advised residents to avoid disturbing the soil in their yards and to take other precautions. Excluding all of seriously contaminated sites—not just portions of them (errs appropriately on the side of public safety. 1The definition of "eligible response sites," under the Senate bill, explicitly excludes "Superfund-caliber" sites, those which have undergone a preliminary assessment and site investigation and have received a pre-score under EPA's site evaluation process that would indicate that the site could qualify for inclusion on the National Priorities List. The draft bill, by dropping this limitation, would greatly restrict the EPA's authority to protect public health from inadequate cleanups at these higher-risk sites.

The draft bill would also allow states to designate "independent of any federal oversight" highly contaminated sites, including hazardous waste disposal sites and areas contaminated with polychlorinated biphenyls as "brownfields." It would then allow states that may not be authorized for corrective actions under RCRA to use federal taxpayer dollars to subsidize the cleanup of sites that would otherwise be regulated under RCRA. This would take place without any federal oversight.

Allowing more, higher-risk sites to take advantage of funding and enforcement limits under a state brownfield program greatly concerns us because of the inad-

equacies of some of the state programs. (Our concerns about state programs are discussed below.) The Sierra Club strongly opposes the concept of 1) making high-risk sites eligible for funding and restricted federal enforcement, 2) reducing the enforcement authority of the federal government, thus leaving oversight largely to the states, and 3) failing to set minimum, commonsense requirements for state cleanup programs. This is precisely what the draft bill proposes.

Limits unnecessarily the ability of the federal government to protect public health and the environment.

The draft bill makes a number of changes in existing law and in S.350 that, taken together, significantly weaken the federal safety net for protecting public health and the environment from contaminated waste sites. By severely undermining the federal safety net, this draft bill erodes the public's ability to rely on EPA as a safeguard for the health of their families and neighborhoods.

There is no need to limit the ability of the federal government to protect public health. As EPA Administrator Whitman testified in the Senate and is reported to have told the U.S. Chamber of Commerce (National Journal's Congress DailyAM, June 19, 2001), the EPA has never superceded a state brownfields decision.

In seeking to address a nonexistent problem, the draft bill goes unacceptably beyond S. 350 in weakening the federal safety net, which authorizes EPA to order polluters to clean up contamination that may present an imminent and substantial endangerment to public health and the environment. Not only does this provision bar the EPA from ordering cleanups, but it goes even further, amending Section 113 of CERCLA, to prevent the Agency from undertaking or assessing polluters costs for long-term cleanup activities. (Section 129(b)(1)(A) of the draft)

While S.350 preserves the meaning of the "imminent and substantial endangerment" standard to avoid unnecessary litigation, the draft bill drops this term, whose meaning has been established through years of litigation. Instead of enabling the EPA to prevent threats to public health, the draft bill shifts the focus to controlling damage during emergencies or instances where the state has delayed taking action. (See Section 129(b)(1)(B)(iii) and (iv) of the draft bill.) Instead of serving to prevent threats to health, the draft bill would limit federal authority to responding to an emergency, presumably situations where health or environmental threats have occurred. The term "emergency" is not defined, however, and introducing this new concept seems likely to trigger considerable litigation. We view this change as yet another weakening of the federal safety net.

In S.350, the limits on EPA's enforcement authority apply only to sites that states plan on cleaning in the coming year or that states finished cleaning in during the previous year, and which the state includes on publicly available database. The state must also provide basic information pertaining to whether the sites will be suitable for unrestricted use and what, if any institutional controls are relied upon. States must update this record at least annually. Making information on response actions available to the public is important to provide citizens with greater information about the cleanups occurring in their communities. Creating broader awareness of institutional controls that are in place can be extremely important in protecting the public. The public record provision is a commonsense requirement that should be a prerequisite for any federal brownfields funding; without it, there can be no accountability for states' use of federal funds. The draft bill has completely dropped this critical requirement, thus eliminating an important resource that citizens can use to examine the state cleanup program, hold the state agency accountable, and ensure improved enforcement of institutional controls.

Reducing EPA's ability to intervene will not only put the public at risk from inadequate cleanups under state supervision, but it could remove the incentive for responsible parties to perform adequate cleanups in the first place. Preserving the federal safety net strengthens the hands of state officials who are negotiating with intransigent parties. State officials can invoke the prospect of federal intervention if parties fail to meet state requirements. Without this stick, state officials will lose negotiating leverage with private parties.

Because of the inconsistent and inadequate protection provided by state cleanup programs, the federal government should retain its current authorities to protect public health. The federal government has more resources, technical expertise, and greater guarantees for public involvement than many states. The federal government can use these tools to prevent or mitigate threats to public health from inadequate cleanups. If Congress weakens the federal safety net, it risks jeopardizing these important protections.

These unnecessary limitations on federal enforcement authority under CERCLA and the Resource Conservation and Recovery Act are especially troubling because

the draft bill expands the definition of brownfields to include higher-risk sites and fails to set minimum standards for state cleanup programs.

As described below, the draft bill also significantly modifies language in Title II of S. 350 that limits liability for developers, innocent landowners, and owners of land that is contaminated by adjacent property. This language has been relatively consistent in previous bills offered by Members of both parties. In combination with the other provisions related to the federal safety net, these changes would weaken protections for public health and incentives to ensure that only responsible developers can avail themselves of liability limitations.

There is no real, documented need to weaken federal protections. With state liability exemptions, future federal liability relief such as those provided under Title II of S.350, and commonplace insurance policies, responsible developers have no reason to be concerned about the need for future clean up costs as long as they adequately clean up waste sites. The only parties that need increased finality are irresponsible companies, those who fail to clean up toxic waste sites adequately, redevelop these sites, and then sell them to unsuspecting people. This is precisely the rationale for federal protection.

Fails to ensure that state brownfields programs meet minimum standards.

The draft bill sets no minimum standards for state brownfield redevelopment programs. Instead, it makes available money to all states and limits federal enforcement authority in all states, regardless of the adequacy of a state's cleanup program.

The draft bill identifies some of the most important elements of a credible state program: timely survey and inventory of brownfields sites; oversight and enforcement authorities; resources to ensure that adequate response actions will protect human health and the environment and comply with applicable federal and state law; resources to ensure that if the person conducting the response fails, there is a mechanism for the necessary response activities to be completed; mechanisms for the public to participate in a meaningful way; and mechanisms for approval of a cleanup plan and a requirement for verification and certification. But these program elements are purely discretionary, and states may receive federal funds regardless of the quality of their brownfield redevelopment program. (Section 129)

State cleanup programs vary tremendously. A dozen states, including Ohio, lack assurances for public participation in their cleanup programs, according to a 1998 report by the Environmental Law Institute. Some state cleanup programs rely extensively on weak cleanup standards, containment and institutional controls rather than cleanups that would protect public health and the environment, according to 1998 reports by the General Accounting Office (*Hazardous Waste Sites, State Cleanup Practices*) and the EPA's Office of Inspector General (*Supervened, State Deferrals: Some Progress, But Concerns for long-term Protectiveness Remain*). A recent audit of New York's cleanup program found similar weaknesses (*Dept. of Environmental Conservation, Selected Operating Practices to the Remediation of Inactive Hazardous Waste Disposal Sites*, February 2001). The state's Comptroller found that after sites had gone through the state cleanup program, 30 of 221 sites did not meet state cleanup standards, and at 141 other sites, state records did not demonstrate whether cleanup standards had been met.

Certain states have particularly inadequate cleanup programs. In Ohio, for example, the public is not notified of cleanups until after they occur, and the state has provided financial incentives to redevelop sites that are never cleaned up. By failing to set minimum national standards, brownfields legislation risks rubber-stamping inadequate programs like Ohio's and providing the resources for the state to increase the number of shoddy actions it takes under its program. Consider the following scenario that could occur under Ohio's Voluntary Action Program, according to Cincinnati environmental attorney David Altman:

If an on-site sewer system or an underground coke oven gas line of an old, urban steel plant leaked benzene on the plant's *own property* near the fence line of its urban neighbors and as a result of that leak nearby homes filled with fumes, the rules require very little to be done. This steel company could black-top over its contaminated property, put a "Don't drink the water" restriction in its deed, and calculate a secret risk assessment to "determine" for itself the threat to off-site people. If the *steel company* is satisfied with its risk assessment calculated or derived from the data and assumptions that it chooses to use, that there will not be too many "excess" cancer deaths, **no cleanup will be done**. In addition, neither neighboring families nor the Ohio EPA will get all the data concerning the spill and will never need to be told about the risk assessment. The only data that would need to be disclosed is the data which supports the *steel company's* position and conclusion. Finally, if the steel com-

pany has a document retention program which requires disposal of “unused data” after six months, the law actually allows the destruction of that data! (from testimony of D. David Altman, *On Proposed Rules for Ohio’s Voluntary Action Program*, September 5, 1996, before the Ohio Environmental Protection Agency)

These documented weaknesses of state programs suggest that limiting federal enforcement authority at toxic waste sites, while increasing federal funding for states’ voluntary clean up programs, may result in increased public health and environmental risks.

Fails to provide the public with information and opportunities to participate in cleanup and redevelopment decisions.

Under the guise of “permit streamlining,” the draft bill requires the EPA to issue regulations that could minimize or even eliminate protections under all federal statutes for public participation and dissemination of information for cleanup actions under state programs. (Section 303) Although the bill does not authorize any exemption from substantive standards required by law, the line distinguishing procedural and substantive can be a thin one.

Drastically restricting or eliminating a public comment period, for example, could mean that the public would not have a fair opportunity to offer meaningful comment on the substantive requirements. It could also make it much easier for businesses to get permits—against the wishes of local citizens—for hazardous waste incinerators, permanent waste landfills, and discharges of toxic waste into water. It could also incite years of litigation as polluting industries press for more contaminating activities, and citizens fight to preserve the sanctity of their neighborhoods. Ultimately, this provision could reverse decades of advances that now provide the public with access and the right to participate meaningfully in decisions affecting public health and environmental quality in their neighborhoods.

Eliminates the EPA’s authority to ensure that state cleanups comply with local, state or federal public health safeguards.

S. 350 explicitly maintains the EPA’s authority to ensure that state cleanups protect public health by complying with state, local or federal safeguards. (Section 128 (e)(1)(A)(ii)) These “relevant and appropriate requirements” are protections which, though not legally mandated cleanup standards, nonetheless provide clear protective guidelines for cleanups. Examples include state drinking water and groundwater standards, solid waste cleanup and management requirements, and federal and state air quality standards. Without this requirement, states desiring to provide higher levels of protection to their residents would find the job much more difficult. Unfortunately, the draft bill deletes this requirement, which would likely further undermine the adequacy of state cleanups. In their rush to redevelop contaminated sites, states may choose to err on the side of faster and cheaper redevelopment, rather than better, or more protective redevelopment. If federal taxpayers are going to subsidize state voluntary clean up programs, then Congress should ensure that the cleanups are complying with standards and protecting public health, rather than creating potential bombs in communities across the country.

Delays or blocks listing heavily-contaminated sites on Superfund’s National Priorities List.

Although EPA has the authority to list a site on the National Priorities List without the concurrence of a Governor, in practice the EPA closely coordinates listings with state officials and, as a rule, does not list sites without a Governor’s concurrence. The draft bill could delay or stop the EPA from listing a site by requiring the EPA to obtain the Governor’s concurrence before listing. If the Governor assures the EPA that the state is addressing or *will* address the site under state authority, the EPA may not list the site without a finding that the state is a “major” potentially responsible party at the site. (Section 302) These provisions tie the EPA’s hands and may prevent the Agency from addressing threats to public health at the site, even when the state is doing nothing to protect the public.

It would also restrict the ability of citizens and city, county or regional officials to get heavily contaminated sites listed. Congress should not render meaningless citizens’ current ability under Superfund (Section 105) to petition EPA to list a site. This provision can provide an important tool for local citizens who are concerned about years of state inaction at heavily contaminated sites. Further, the bill indiscriminately places the wishes of a state governor above the needs of local officials, who may have on-the-ground knowledge about a site, how it affects their local community, and the need to get it expeditiously cleaned up.

Encourages risk-based cleanups that could endanger public health by leaving toxic contaminants on site.

Section 129(a)(1)(A)(ii)(IV) of the draft bill allows states to use federal grants to “establish or enhance a program or framework for conducting risk-based cleanups,” a provision not included in S.350. The Sierra Club strongly opposes the encouragement of risk-based cleanups, which result in leaving contamination on site rather than removing it.

“Risk assessments” are at best inadequate and imprecise estimates of actual risk. They attempt to assess only a few of the many risks associated with contaminant exposures. They almost always ignore the complex interactions among the many chemicals to which potential victims are always exposed, and the outcomes are always heavily influenced by the biases of the risk assessors. It is easy to bias an outcome by many orders of magnitude through inappropriate use of overly favorable assumptions. Further, risk assessments may fail to protect the health of sensitive subpopulations, including pregnant women, children and people with HIV or AIDS or those who are undergoing cancer treatment.

Site-specific risk assessments can underestimate real-world risks in that they allow the risk assessor to exclude from the calculation risks that can be “cut off” by a cap or a fence or a land use that assumes that no one ever will go there.

Risk assessment procedures based on an identical set of realistic assumptions AND using laboratory data of equal quality (objectives rarely achieved in real-world situations) can sometimes be of limited value in comparing a variety of clean-up alternatives, but only for those limited impacts actually assessed. They are scientifically incapable of “proving” that one particular option is “safe” or “safe enough”.

Appropriate use of risk assessment techniques will be very expensive, especially for small sites. Instead of basing decisions on risk assessments, the emphasis should be on eliminating or minimizing exposure. It is easier to qualitatively describe the potential consequences of known exposures than risk, and easier for the public to understand. Combining this with information about health effects can be a good argument for treatment or removal of the source of the risk.

Eliminates environmental justice considerations from grant application criteria.

Section 128(e)(3)(J) of S. 350 included as a grant criterion the extent to which a grant would address or facilitate the identification and reduction of threats to the health and welfare of minority communities. We think that it's important that a brownfields bill recognize that minority communities may be more affected by brownfields sites and may be less able to address these problems on their own. The draft bill deletes environmental justice from the criteria the Administrator must include when establishing a system for ranking grant applications.

Provides liability exemption for entities that fail to protect people from toxic waste.

S.350 exempts from liability contiguous property owners and innocent landowners who take reasonable steps to stop continuing releases, prevent any threatened future releases, and prevent or limit exposure to any hazardous substances releases on or from the property. (Section 201(o)(1)(A)(iii) for contiguous property owners and Section 302(2)(II) for innocent land owners) The draft bill deletes the “reasonable steps” requirement for obtaining liability exemption, increasing the risk of public or environmental exposures and saddling the taxpayer with the costs.

Provides liability exemption for entities that buy contaminated property without making appropriate inquiry.

S.350 reasonably requires prospective purchasers to make appropriate inquiry and inspect land prior to purchase if they are to be exempt from liability. Contiguous property owners are required to conduct all appropriate inquiry and to have no knowledge that the property was being contaminated by adjacent property in order to be exempt. (Section 201(o)(1)(A)(viii)) Similarly, it requires innocent landowners to conduct all appropriate inquiry. (Section 201(2)(I)) The elimination of these requirements in the draft bill shifts the burden from landowners to the general public.

Eliminates brownfields training programs

The draft bill also eliminates S.350's provision that gave the EPA's authority to provide funds for training, research and technical assistance to community members and organizations that can facilitate inventorying, assessment, remediation, site preparation and community involvement in brownfield sites. The elimination of this provision deals a severe blow to ensuring that local people can help solve local problems in their community. Federal brownfields legislation should facilitate exactly this type of involvement.

In conclusion, for the reasons stated above, this draft bill weakens protections under existing laws and will likely increase public health and environmental risk.

The Sierra Club strongly opposes this draft bill, and I believe that many of our colleague organizations share that view.

Thank you for the opportunity to testify today. I will be happy to answer any questions you may have.

Mr. GILLMOR. Thank you, Mr. Hopkins, and let us proceed to questions.

First, for Mr. Garczynski, both the Senate bill and what is being referred to as the Democrat discussion draft limit CERCLA protections to only people who conduct the cleanup. That narrow language prevents a transfer of enforcement protection from current owners to future owners, and potentially excludes them from protection—a range of other parties that otherwise would have been covered.

The so-called Gillmor discussion draft rectifies those problems by including Sections 7002 and 7003 of RCRA as part of the Federal enforcement protection for brownfield sites cleaned up under a State program. And the draft further applies these protections specifically to the contamination that is the subject of the State cleanup only in just one class of party.

Could you explain why you think this might be a more preferable approach?

Mr. GARCZYNSKI. Well, we were very concerned that in S. 350 and the House Democratic draft that the Federal enforcement protections only applied to the person who did the cleanup or the firm doing the cleanup as opposed to eventually a future owner, someone who was renting the property or leasing the property.

So we think the extension of that protection should be confirmed on those individuals or future owners and tenants as well, and they should be given the same Federal enforcement protections. So we applaud that in this particular draft.

Mr. GILLMOR. Let me direct another question to you, but also the same question here to Mr. DeMarco, and that question would be that, do both the Senate version and the Democratic discussion draft provide a definition of brownfield site that does not adequately cover sites contaminated with petroleum?

S. 350 and the Democrat discussion draft exclude petroleum contaminated sites from liability protection and Federal enforcement protections, even though the cleanup was pursuant to an approved State cleanup program. The Gillmor discussion draft takes a more expansive approach by including a broader range of petroleum contaminated sites within the definition of brownfields.

What is your view of expanding the definition of brownfields to more broadly cover petroleum contamination?

Mr. GARCZYNSKI. Let us go back to the numbers that I cited. If we say—and you can probably vary in the total amount—but it is 450,000 to 500,000 sites in this country, and up to 200,000 are petroleum contaminated. Why take those out of play?

When I leave here today, I am going to take this suit off and go over to a job, an in-field job we are developing in Baileys Crossroads right in Arlington. I am going to pass probably 12 abandoned gas stations in great locations for either commercial or residential development.

Why should they be taken out? What kind of vitality can you have in a reclamation area or in a revitalization area if those type

of sites can't be addressed? That is why I think the expansion to petroleum-based sites is imperative.

Mr. DEMARCO. I would echo those remarks, and I guess add that virtually every site contaminated that we have dealt with as a company, a major contaminant, has been underground tank—heating oil or gasoline. And attitudes have changed quite a bit, and the science has changed quite a bit, where people are not up in arms over how to deal with these problems.

Lenders are comfortable dealing with these problems. We do non-recourse financing with customers that allow permanent loans with, say, insurance companies. There are carve-outs always for hazardous materials, environmental issues. So, you know, as a developer, we want to be comfortable that we encounter situations and if there is a definite way of dealing with them, and we can bring them to finality.

We found that in taking out petroleum tanks if they come out, you know, you can estimate how much it costs to take them out, you can see whether it is leaking, you can take out soil that has been contaminated, and I would say in our experience that is 80 to 90 percent of what we run into. So I think it is extremely important. It is the lower risk here of contaminated issues that we are talking about in regards to Superfund.

Mr. GILLMOR. Let me direct a question to Mr. Lynch. I noticed from your testimony that you had some good things to say about Ohio's voluntary action program. And as a realtor and a member—a former member of the Cleveland City Council, have you found that voluntary cleanup programs run by the State are effective?

Mr. LYNCH. They are effective, but there is still the problem with, really, the double jeopardy from the standpoint that the sites are cleaned up but there still is that hammer over the property's head basically dealing with the potential impact of EPA coming back in and saying that there may be additional cleanup that is required.

Mr. GILLMOR. Thank you.

The gentleman, Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman.

I wanted to ask Mr. Roth a question first. I believe you gave us good advice when your testimony states that the subcommittee should conform its brownfields bill as nearly as possible to the Senate provision on reopeners.

As I understand it, your organization of civil engineers, many of whom I am sure are directly involved in these redevelopment activities, believes that the bipartisan approach to the Senate bill on the reopeners question gives States ample opportunity to carry out a brownfields cleanup under minimum Federal oversight while protecting human health in case of a cleanup failure by preserving critical Federal enforcement authorities.

Is that correct, and would you, you know, just comment on that briefly?

Mr. ROTH. Yes. First, thank you. As engineers and members of the American Society of Civil Engineers and civil engineers in our profession, our fundamental canon of ethics requires us to hold the safety, health, and welfare of the public paramount. In addition to that, however, we also as civil engineers are seeking ways to pro-

mote sustainable development as well as a wide range of environmentally sound public policies.

We support the bipartisan compromise in S. 350 because we think that other approaches could potentially weaken the important provisions for protection of human health and the environment.

Mr. PALLONE. Now, you believe that States should be required to demonstrate that their programs satisfy minimum Federal criteria for qualified programs. That is correct also?

Mr. ROTH. Yes. Again, we are coming from the perspective of protecting human health and the environment, and if there is an assurance that the State programs meet certain—or meet the Federal guidelines, that is certainly acceptable.

Mr. PALLONE. Thank you.

I wanted to ask Mr. Hopkins, you know, you sort of got to the heart of what I was saying in my opening statement earlier today when you said that you are concerned that, you know, the Senate bill obviously passed the Senate, could pass the House, but that the chairman's draft, you know, might unravel so to speak, you know, the compromise I guess that was achieved in the Senate and ultimately, you know, we would not be able to pass the bill, either in the House or in the Senate, you know.

And I think that was premised on the notion that, you know, the Senate was a very—the Senate bill was a very carefully crafted compromise and that we don't really want to get away from it too much.

I mean, I think that the Democratic draft is not—you know, is really making some clarifications or adding a few things here or there, but it doesn't really substantially change the Senate bill, whereas my concern, as I said in my opening statement, is that the chairman's draft really is a significant change, and that if we were to adopt that here in the subcommittee we would have a hard time getting it, you know, through the House or through the Senate.

Would you just comment on that a little bit? Because, I mean, obviously our goal—I think everyone's goal, including the chairman's, is to get a bill on the President's desk. But I think that there is a real problem if we get too far away from the Senate compromise. We haven't really had any discussion of how significant this compromise was and how difficult it was to achieve in this Senate.

Mr. HOPKINS. Well, Representative Pallone, as you know, brownfields legislation has been debated for I don't know how many years now, but the last several Congresses. And there really hasn't been a lot of progress toward achieving legislation.

And this year, over the past year, for the first time there is really a consensus come about over the Senate bill and a lot of the issues that we are talking about here today about the appropriate level of contaminated sites to bring into a brownfields bill, or the reopeners for Federal enforcement were thoroughly debated over in the Senate, and a very finely honed compromise was struck.

And I think if a much more different bill comes out of the House than was passed in the Senate it will be difficult to reconcile those. And I also want to say that we weren't entirely happy with the

Senate bill that passed, because, as you know, it doesn't include required program criteria for State programs.

And, again, we don't necessarily believe that there is a need for additional finality language. So while we weren't entirely happy with it, we believe it is a lot better than the majority bill that is being discussed here.

Mr. PALLONE. Thank you.

Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman from Illinois.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I would just, before I go on with my questions, just note that in the Democratic draft, page 55, you have about a page—two pages of qualifications which are added, which would be new hoops to draw through, jump through.

And so just to casually say it doesn't change course or it—I think we need to make sure we look at the draft and identify that there are some new provisions in here. So we ought to be talking about maybe some of the things in the Democratic draft that probably aren't as acceptable as sometimes we hear here.

I have got a couple of questions, but can anyone tell me what “may” means? May. Every time we talk about this imminent substantial endangerment, we always forget “may.” I don't understand why we do that. Mr. Hopkins, you forgot “may” when you mentioned it. What does “may” mean?

Why don't we just say it presents imminent substantial endangerment, and just quantify it and say, “This is a dangerous situation. We are going to go in.” Instead of saying, “Well, maybe it will, or maybe it will not.” I am not going to follow up on that, but I just find it very ironic that whenever we talk about imminent substantial endangerment no one mentions “may.”

Again, I am not a lawyer, so—Mr. Garczynski, on the Gillmor discussion draft, aptly named—the gentleman from Ohio, which the State of Ohio has also been named in a couple arenas here today—it provides the protections for bona fide prospective purchasers who are not polluters and who purchase property after the pollution has occurred.

Senate 350 and the Democratic discussion draft provide prospective purchasers liability protections under CERCLA, but fail to provide protection under RCRA. The Gillmor draft extends prospective purchaser protection to RCRA, Sections 7002, 7003, and 9003(h), which is a storage tank issue, as we know.

You highlighted this in your written testimony. Can you elaborate why this makes such a difference for your members in providing greater certainty to prospective purchasers for redevelopment of petroleum contaminated brownfield sites that are cleaned up under a State program?

Mr. GARCZYNSKI. Yes, Congressman. I believe it goes back to a couple of points. No. 1, again, the sheer number of sites that would be available if we could address petroleum contaminates. No. 2, the issue of the certainty is important because unlike the Sierra Club or my friends—the civil engineers who we hire—I have to sign my name on a loan document that is putting everything I own at risk most of the time.

I want to have as much finality when I sign my name as possible. And I think my lenders do as well. So that is why when we get to these issues of certainty and finality they are important to me as a builder/developer, maybe more so than other stakeholders.

And the number of sites that are addressed in terms of the petroleum—if 95 percent of us are redeveloping those sites, okay, we are not the original polluters, so we want to make sure that if the site is cleaned up and the liability and the enforcement of the State have been provided, hopefully that would be good enough for the Federal Government as well.

Mr. SHIMKUS. And I am glad you continue to talk about the finality issue. That is what I opened up with, and that is—really, that is one of the importance—of the chance and at least in the Gillmor discussion draft as to—to address that.

Do you know if the EPA supports the need for greater finality for State brownfield cleanups? Do you have any idea?

Mr. GARCZYNSKI. We had a conversation with Administrator Whitman about 2 weeks ago, and addressed this finality issue. And, of course, I think as her deputy said this morning, EPA still has to be there for that may endanger the health, safety, and welfare. But she was open to the discussion of the finality issue provided, again—and we hear that word that the chairman asked about—if it were approached in a bipartisan compromise.

So I don't have a true answer on her position, but she said she was open to the discussion. That is correct, Mr. Chairman, as I remember it.

Mr. SHIMKUS. And if I can just go to Mr. DeMarco at the end. I mentioned the Clark Company who is redeveloping a brownfield site, and they used a procedure of—of course, the company is professional in developing those types of sites, but also the aspect of getting insurance and coverage in case something happened.

Can you just talk us through that? I didn't have a good handle on it even after they explained it to me. You sort of mentioned it in your opening comments. And then just tie it into what we are trying to do here today, and this insurance aspect of trying to cover people. Which provision would be more helpful or harmful?

Mr. DEMARCO. Well, as I understand the proposed bills, funds available would be able to be used toward insurance. But I think what has happened over the last 10 years, really, is that environmental insurance has become a more and more valuable tool in facilitating handling brownfields or contaminated sites.

Actually, we are currently working on two transactions. When you negotiate the purchase of a site or a lease, whoever is coming in and is now part of that property wants to fully investigate the property. I mean, our development team—a key member—is our environmental consultants.

The landowner wants to keep control of the exploratory process, and yet is not going to make a deal with a buyer or somebody who is going to lease unless they feel comfortable there has been full exploration and that there is something backing up potential problems.

Environmental insurance we found has filled this role. We have written several environmental insurance policies for premiums that are getting most cost effective because more of them are being writ-

ten, and it is a very useful and comprehensive protection in the private sector for a purchaser or a long-term lessee of a property. So we find it pretty effective and see it happening more often.

Mr. SHIMKUS. Mr. Chairman, if I can just finish up——

Mr. GILLMOR. Proceed. Proceed.

Mr. SHIMKUS. Mr. Garczynski, I wanted to follow up with the last question on this finality debate. Do you feel that it is important to extend the finality provisions to Section 7002 and Section 7003?

Mr. GARCZYNSKI. I have my counsel available to reeducate me on those sections. He reignited my interest in those as did your question.

From the citizens' standpoint, the citizens' committee, we do not think that that is necessary for this reason. When we go through a zoning or an application to a county, city, or town, on a piece of property, or just an approval, there are lengthy hearings for ample citizen input.

I think it starts even before you attempt to get on the schedule, so we think that that certainly I think gives citizens the opportunity to comment on any brownfield site that may be being considered for redevelopment.

Second, as far as the EPA is concerned, if it is not a Superfund site or there is not EPA involvement to begin with, then—and they are not involved in investigation, then we think that that should be considered under the broad definition of a brownfield site.

Mr. SHIMKUS. Okay. Thank you.

Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you. Let me—just one question that came to mind on your comment, Mr. DeMarco, on the environmental insurance. Could you or some of the other panel just give me kind of a range on what that premium would be vis-a-vis the property value? And I presume it is like title insurance, it is a one-time premium?

Mr. DEMARCO. Yes. For instance, we have recently underwritten a policy—had one for us done that was a 10-year policy, \$75,000 deductible, and about a \$75,000 premium for about a \$5 million limit. So that is the nature of that policy.

Mr. GILLMOR. Let me now ask unanimous consent of the committee to insert a number of items in the record. We have a letter of support from the National Governors Association. Do you want to do those separately?

Mr. PALLONE. Well, I just would also ask unanimous consent that a number of letters from various organizations with regard to the Senate bill be inserted in the record. I have—I guess this is from the U.S. Conference of Mayors and there are a few others.

Mr. GILLMOR. And also, we have a number of letters of support for the Gillmor draft. And since it is only you and I, Frank, I think we will have no objection to—also, I would ask unanimous consent that we keep the record open for 30 days, so that members may submit further documents, particularly opening statements, and that we got that one in. Without objection, it is so ordered.

I very much appreciate all of you coming. It is very helpful. Thank you.

[Whereupon, at 2:55 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
July 26, 2001

Honorable PAUL E. GILLMOR
Chairman, Subcommittee on Environment & Hazardous Materials
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

DEAR CHAIRMAN GILLMOR: I want to thank you for providing me with the opportunity to testify on June 28, 2001 before the Subcommittee on Environment & Hazardous Materials on brownfields legislation. This issue is of great importance to the State of New York, and we firmly believe that our wealth of experience in redeveloping these sites can be of material assistance to the Subcommittee as it debates and refines the legislation.

Based on New York's more than 20 years of experience, we believe that there is a pressing need for federal legislation to facilitate and assist the financing of brownfields and voluntary cleanups. The New York State Department of Environmental Conservation (Department) firmly believes that the House Majority Draft would provide the greatest benefit to states, municipalities and non-responsible parties. This draft legislation meets the three criteria of greatest importance to the State of New York, in providing a mechanism for finality requiring gubernatorial concurrence for listing a site on the National Priority List, and by authorizing much needed funding for the investigation and cleanup of brownfields.

In further support of my testimony, I would like to take this opportunity to stress the importance of providing adequate assurances that parties participating in a cleanup pursuant to a state response program will not be thereafter subjected to enforcement by the federal government. In particular, the Department submits that the finality language and the clearly limited, reasonable exceptions to it contained in the House Majority Draft are not only appropriate but critical to ensuring the effectiveness of brownfields remedial programs. Without this language, states would be unable to provide sufficient assurances of finality. The finality provisions of your discussion draft are a fair compromise between the various points of view and sufficiently outline the narrow circumstances where intervention from the United States Environmental Protection Agency is justifiable. Without such finality, persons interested in redeveloping a site, or in providing the financing necessary to construct a new facility at a site, would avoid such transactions at contaminated sites.

I want to thank you again for providing me with an opportunity to share with you the views of the Department on an issue of such great importance to the State. Please do not hesitate to call on me if I can be of further assistance.

Sincerely,

ERIN M. CROTTY
Commissioner

cc: The Honorable Vito J. Fossella
The Honorable Edolphus Towns

PREPARED STATEMENT OF THE NATIONAL GOVERNORS ASSOCIATION

Thank you for the opportunity to submit testimony for the record of this Subcommittee hearing on the subject of Brownfields legislation. The Governors believe that remediation of brownfields sites is critical to the successful redevelopment of many communities. We commend the Congress for crafting a legislative proposals that have the potential to significantly enhance and expand the cleanup of moderately contaminated brownfields sites across the country. The National Governors Association (NGA) supports swift passage of a bipartisan bill that can be signed by the President. Passage of brownfields legislation should be a priority for this Congress, but it must be legislation that encourages actual cleanup of the sites.

Brownfields represent an enormous potential economic development resource, one that can lead to new jobs, healthier neighborhoods, increased local tax revenues, and less suburban sprawl. Successful state brownfields programs improve the quality of life for a community, which in turn, increases that community's economic competitiveness and helps it attract new business and workers. State brownfields programs have been operating now for about a decade, and states are very proud of their record of success. In that short period, state programs have productively facilitated reuse of more than 40,000 sites. In prior testimony before this Subcommittee

in March, we outlined the investment that states have made and continue to make in bringing brownfields sites back to life.

State flexibility should be recognized, and not impeded, under federal law to stimulate brownfields redevelopment, and the federal government can help remove some of the existing impediments. State brownfields programs allow redevelopment to take place relatively quickly, with appropriate cleanup standards, and with minimal government involvement. However, some developers are afraid that their involvement in these state-managed sites may result in federal environmental cleanup liability under, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, commonly referred to as "Superfund." As a result, valuable industrial land remains contaminated, unused, or abandoned, denying communities economic activity and the direct benefits of jobs and taxes. There is no question that brownfields redevelopment is currently hindered by the pervasive fear of federal liability under the Superfund statute. Governors believe that brownfields legislation should help address this problem, as the June 13 Discussion Draft, S. 350, and the June 18 Discussion Draft do, by providing needed liability protections for innocent owners, prospective purchasers, and owners of property contiguous to contaminated sites.

Just as importantly to Governors, legislation should preclude enforcement by anyone (other than by a state) at sites where cleanup has already occurred or is being conducted under state programs, except in exceptional circumstances. This "finality" should mean what it says—satisfactory completion of a cleanup under state law should be final. To not give this assurance to developers who are spending thousands, or hundreds of thousands, of dollars of their own money to rehabilitate a property reduces the chances that the rehabilitation will happen.

We do not disagree with those that want exceptions to this finality, but the exceptions should be limited and should give states an adequate opportunity to take appropriate action themselves before EPA is permitted to reopen the cleanup and take an enforcement action against the owner or the developer.

NGA supports the finality provisions in the June 13 Discussion Draft that would improve the effectiveness and pace of brownfields cleanups by allowing state cleanup programs to provide assurance to landowners who wish to develop their property without fear of being engulfed in the federal liability scheme.

For several years NGA has consistently sought language in both Superfund and brownfields bills regarding finality. We have supported bills in prior years that barred the Environmental Protection Agency (EPA) from imposing Superfund liability after a state-approved brownfields cleanup unless a release or threatened release required a response action was immediately required to prevent or mitigate a release health emergency and the state was not responding in a timely manner.

We have also supported bills that limited federal or judicial enforcement actions only if the state requests such action, contamination has migrated across state lines, the Agency for Toxic Substances and Disease Registry issues a public health advisory for the site, or if the President determines that response action or immediately required to prevent, limit, or mitigate an emergency when there is an immediate risk to public health or welfare or the environment and the state will not take the necessary response actions in a timely manner. Conversely, we have not supported bills that failed to preclude federal actions at sites where a cleanup had occurred or was occurring at non-NPL sites in the absence of a real emergency, believing that such provisions would make it too easy for EPA to simply second guess state decisions at sites under the state's jurisdiction.

The finality provisions of the June 13 Discussion Draft, S. 350 and the June 18 Discussion Draft do not go as far as NGA's prior positions have sought. The June 13 Discussion Draft, however, is the fairest compromise between the various points of view and narrowly outlines the circumstances where intervention from EPA is justifiable. In addition to the state-request, and state-line or federal property migration exceptions, the June 13 Discussion Draft bars Superfund liability unless EPA determines not only that a release or threatened release presents an "imminent and substantial endangerment" to public health or welfare, but also that an emergency situation exists, and that the state will not quickly respond. The June 13 Discussion Draft also provides a more practical 72-hour period of time for a state to reply to EPA of the action it intends to take, while maintaining an option for EPA to take immediate action if necessary. These are reasonable conditions and we are willing to support them for the sake of working with the Congress for speedy passage of a bill.

Like the finality provision, the Governors have for many years sought to include in any Superfund or brownfields bill a provision according each Governor the statutory right of concurrence on EPA's decision to place new sites on the NPL in his or her state. The right of concurrence on new NPL listings ensures that states have

the right of first action at hazardous sites, and where a state is proceeding with cleanup, or has plans to do so, the federal government will defer. As states are closer to the sites and to the affected community, such deference is entirely appropriate. We would note that this right of concurrence applies only to long-term cleanup and does not in any way limit EPA's authority to respond to immediate problems. Nor does it in any way impede EPA's ability to take action at the hundreds of sites that are already listed on the NPL.

Placement of new sites on the NPL without the concurrence of the Governor when a state is prepared to apply its own authority is not only wasteful of federal resources, it would be counterproductive, resulting in increased delays and greater costs. Over the years EPA has recognized that states are currently overseeing most cleanups, and has, as a discretionary matter, sought gubernatorial concurrence before listing a site. We ask merely to have this informal policy codified in law to assure that it continues throughout future administrations. We greatly appreciate the inclusion of a provision in the June 13 Discussion Draft requiring gubernatorial concurrence before a site is listed on the National Priorities List, except in limited situations.

The funding provisions in the bill that provide grants to states and local governments for both response actions as well as site assessments are very positive steps in assuring that financial assistance is available so that sites can actually move toward final cleanups. But we hope that the funding is not so restrictive that states will have no incentive to apply for the money.

We appreciate the Subcommittee's consideration of our views, and we look forward to working with you on the development of brownfields legislation during this session.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
June 27, 2001

The Honorable PAUL GILLMOR
Chairman
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington D.C. 20515

DEAR MR. CHAIRMAN: Thank you for scheduling a hearing on June 28, 2001, to discuss moving forward with brownfields legislation. Passage of brownfields legislation is a priority for President Bush and the Administration and provides an opportunity to remove existing barriers to brownfields cleanup and development. I would like to offer my continued support for your efforts to achieve a bipartisan bill that will encourage developers to work with state and local governments to clean up the hundreds of thousands of underused, idled, and abandoned brownfield properties across the country.

As we approach your hearing, I want to take the opportunity to clarify statements that were reported in the trade press in connection with remarks I delivered at the U.S. Chamber of Commerce event on June 18, 2001. At the time I responded to the question at the event I had not had the opportunity to see the Gillmor brownfields discussion draft. It is clear that my comments were misreported. My comments referred to the issue of finality in general and my desire not to have that issue hold up the progress that has been made on moving important brownfields legislation forward.

Let me repeat for the record my testimony before your subcommittee on March 7, 2001, brownfields legislation should include "finality" language to address uncertainty over Federal liability and enforcement issues. In addressing these concerns, there could be limited circumstances where EPA would need authority to take further action if a State approves a protective cleanup, where there is compelling evidence that a cleanup is no longer protecting human health and the environment. However, to my knowledge, EPA has never had to "overfile" in order to take over responsibility at a brownfields cleanup proceeding under State authority.

I am eager to continue to work toward a solution on this issue, and EPA stands ready to provide additional assistance to you and other Members of Congress throughout the legislative process.

Sincerely yours,

CHRISTINE TODD WHITMAN
Administrator

STATE OF OHIO
June 27, 2001

The Honorable PAUL GILLMOR
Chairman
Environment and Hazardous Materials Subcommittee
Washington, D.C. 20515

DEAR CHAIRMAN GILLMOR: I am grateful for your work on the Brownfields Revitalization and Environmental Restoration Act of 2001. The redevelopment of our Nation's brownfields into productive, job-producing properties offers the opportunity to stimulate the economy and benefit the environment. States such as Ohio, with a substantial manufacturing history, are particularly in need of a good federal brownfields program to support the brownfields work our State already has underway. Of particular importance are the issues of the State's concurrence in National Priority List (NPL) additions and the finality of the State's sign-off on cleanup projects.

With regard to concurrence in NPL listings, your bill provides Governors with important input and concurrence rights. There are many reasons that a Governor may choose not to concur in a proposed NPL listing. Communities attempting to attract new residents and businesses are very concerned about the stigma that they perceive to be attached to having a "Superfund" site in the community. If state and local governments are willing to address contaminated properties, a Superfund listing is an unnecessary impediment to quick and effective revitalization. I am very pleased to see that your bill recognizes the importance of Governors' concurrence in NPL listings.

Your bill also supports state brownfield programs by offering a reasonable degree of assurance that projects approved by the State as protective of the environment will not be subject to further enforcement action by the federal government. The lack of this assurance has been a deterrent to some redevelopment projects, and it is important that this deterrent be removed. Again, I am pleased to see finality addressed in your bill.

Thank you for your work on the important issue of brownfield redevelopment. I am confident that Ohio will see a strong trend toward revitalization as a result of your efforts.

Sincerely,

BOB TAFT
Governor

MORTGAGE BANKERS ASSOCIATION OF AMERICA
July 19, 2001

The Honorable PAUL E. GILLMOR
Chairman
Subcommittee on Environmental and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

DEAR MR. CHAIRMAN: The Mortgage Bankers Association of America (MBA) is pleased to submit this statement for the record on the hearings by your Subcommittee, on June 28, 2001, on brownfields legislation.

MBA strongly supports Federal legislation that will promote the cleanup of brownfields, provide financial assistance for brownfields revitalization, enhance state response programs, and most importantly, clarify Superfund liability with respect to brownfields transactions.

It is estimated that there are approximately 400,000 to 600,000 brownfields sites in the country. The Environmental Protection Agency (EPA) defines brownfields as abandoned, idled, or underutilized industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. According to a recent survey conducted by the U. S. Conference of Mayors, 187 of 231 cities responded that cleaning up existing brownfield sites could generate as many as 540,000 new jobs if the land were returned to production. At least 175 cities estimated brownfield redevelopment could generate up to \$2.4 billion in local tax revenues.

While brownfields can present excellent redevelopment opportunities, they are an underutilized asset that could help communities address a number of issues, including revitalizing urban areas, increasing tax revenues, and promoting sustainable growth. In order to participate in brownfields redevelopment, lenders and developers

must determine an acceptable balance of risk and potential return on investment. This determination requires analysis of a complex array of state and federal environmental laws and regulations.

Environmental risks for lenders come from a number of sources, most of which relate to environmental contamination that has impacted real or personal property used as collateral to secure a loan. Of major concern to the real estate finance industry is the need to clarify lender liability with respect to the liability protection for innocent landowners and purchasers who have not caused or contributed to hazardous waste contamination. There are three types of risks that lenders face with respect to loans that involve hazardous waste contamination, especially when the property to be mortgaged is affected by the contamination:

- The borrower's ability to repay the loan may be affected if the cash flow funding that would otherwise be available is needed to address contamination issues.
 - The lender becomes directly responsible for cleanup costs associated with a particular property.
 - The value of the real estate that has been contaminated is diminished.
- These risks depend upon the application of state and federal environmental laws, as well as EPA and state environmental regulations.

EPA has undertaken administrative reforms to encourage redevelopment of brownfields. However, the current Superfund liability scheme may deter prospective purchasers from buying and remediating brownfields sites. M13A supports laws and regulations that provide safe-harbors so that developers will not be faced with potentially open-ended liability. MBA would encourage Congress to consider the necessity of providing finality to any brownfields remediation program in order to protect prospective purchasers from liability.

MBA is pleased that Congress is addressing the important aspects involved in the brownfields cleanup issue. Passage by the Senate of S. 350, the "Brownfields Revitalization and Environmental Restoration Act of 2001," and your Subcommittee's hearings on the two draft proposals on the subject are evidence of Congress's concern about the need to address the problem.

MBA respectfully urges that your subcommittee report meaningful brownfields legislation in order that Congress can promptly address this important issue. We look forward to working with the House and the Senate in this endeavor.

Sincerely,

CLIFFORD B. HARDY, *Chairman*
MBA Legislative Committee, COMBOG Board
President, First Housing, Tampa, FL

SIERRA CLUB;
NATURAL RESOURCES DEFENSE COUNCIL;
PHYSICIANS FOR SOCIAL RESPONSIBILITY;
U.S. PUBLIC INTEREST RESEARCH GROUP; CLEAN WATER ACTION;
FRIENDS OF THE EARTH; AMERICAN PUBLIC HEALTH ASSOCIATION
June 27, 2001

The Honorable W.J. TAUZIN
United States House of Representatives
Washington, DC 20515

The Honorable PAUL GILLMOR
United States House of Representatives
Washington, DC 20515

The Honorable JOHN DINGELL
United States House of Representatives
Washington, DC 20515

The Honorable FRANK PALLONE
United States House of Representatives
Washington, DC 20515

DEAR REPRESENTATIVE: Our organizations strenuously oppose Rep. Gillmor's draft brownfields legislation, dated June 13, 2001. After more than a decade of trying to pass brownfields legislation, the Senate passed compromise legislation (S.350) earlier this year. Rep. Gillmor's draft brownfields legislation is a step backwards, because it goes far beyond S.350 in rolling back fundamental protections for public health and environmental quality, and will polarize the debate on brownfields, and hinder efforts to pass an acceptable brownfields bill this year. Rep. Gillmor's draft legislation broadly defines brownfields to include highly contaminated sites, fails to

provide any minimum criteria for state voluntary clean up programs, and eviscerates the ability of citizens to rely on EPA or citizen suit authority to protect public health or environmental quality from toxic waste. Because of these problems, and many other deficiencies, we urge the Committee to reject this draft legislation.

Includes Heavily Contaminated Sites

Section 301 of Rep. Gillmor's draft legislation contains an overly broad definition of "Eligible Response Sites," which could severely weaken the federal safety net at heavily contaminated toxic waste sites. Many of our organizations worked closely with the Senate sponsors of S.350 to ensure that bill was narrowly crafted to include only brownfield sites with low levels of contamination. Rep. Gillmor's draft legislation eliminated that language, and then modified other provisions to significantly expand the types of sites, to include high-risk sites, included as eligible response sites.

Fails To Establish Minimum Criteria For Voluntary Clean Up Programs

Rep. Gillmor's draft legislation also fails to include an up front review of state programs to ensure that they contain common sense criteria to protect public health and environment quality. In fact, this draft does not even include the very basic criteria contained in current EPA policy for entering into Memorandums of Agreements with state brownfield programs. Reports from independent state agencies, the General Accounting Office, state-based organizations and organizations of state hazardous waste managers have noted serious defects in state voluntary clean up programs that highlight the need for minimum criteria.

For example, a recent report on Ohio's voluntary clean up program detailed projects where the public was effectively shut out of the clean up process, and where little or no active clean up occurred other than imposing deed restrictions on the se of contaminated property. Yet, Rep. Gillmor's draft bill would severely restrict federal enforcement authority and citizen suit provisions that could ensure polluters clean up these sites.

The lack of an up front review, combined with increased federal funding, could allow inadequate state voluntary clean up programs to ramp up their redevelopment activities, leading to an increased number of unprotective clean ups. Minimum criteria will help to ensure state programs provide the public with relevant and timely information, and with the opportunity to meaningfully participate in the clean up process. Without such criteria, citizens will have little opportunity to ensure that polluters and appropriately clean up toxic waste sites.

Weakens Citizens' Ability To Ensure That EPA Protects Public Health

Further, section 129(b) of Rep. Gillmor's draft legislation effectively wipes out the federal safety net. This section would eviscerate EPA's authority under sections 106, 107 and 113 of Superfund, and section 7003 of the Resources Conservation and Recovery Act (RCRA), to order polluters to clean up heavily contaminated toxic waste sites that continue to pose serious threats *after* a voluntary clean up. The bill would likewise undercut the ability of citizens to protect themselves from contamination by prohibiting citizen suits under section 7002 of RCRA. Under Rep. Gillmor's draft, the Administrator of the EPA would not be able to act to protect neighborhoods unless she determines that a toxic release presents an imminent and substantial endangerment to human health and also that there is *already* an "emergency" *and* the State has refused to take necessary actions in a "timely manner." This undermines the current, well-known standard under current law by eliminating its "preventative" focus, and will result in years of increased litigation.

There is no need to weaken the federal safety net; in fact, doing so only undercuts the efficacy of state clean up programs. Consensus language contained in S.350 already protects developers, innocent landowners, and owners of land contaminated by adjacent property. The language contained in Rep. Gillmor's draft bill goes beyond these sound provisions, and would weaken the principle that protects public health by ensuring that polluter pays to clean up their contamination.

Rep. Gillmor's bill also significantly modifies the consensus language on liability exemptions contained within S.350. For example, section 201 of Rep. Gillmor's draft bill (concerning contiguous property owners) could exempt from liability corporations and people who knowingly purchased contaminated property, and who failed to take any step to protect the public from that contamination. Section 202 of Rep. Gillmor's draft bill (concerning prospective purchasers) would go beyond Superfund to inappropriately prohibit citizens from using section 7002, and EPA from using sections 7003 and 9003 of RCRA to ensure that developers adequately clean up hazardous waste and petroleum contamination. Further, section 203 of Rep. Gillmor's draft bill (concerning innocent landowners) significantly reduces the level of inquiry that owners would have to show in order to qualify for an exemption from liability. It also

provides EPA, or other unspecified parties, with overly broad discretion to promulgating regulations that establish standards of inquiry that corporations and people must meet prior to qualifying for an exemption from liability.

Overall, Rep. Gillmor's draft legislation would deny citizens the ability to prevent inadequate clean up decisions at highly contaminated sites; while at the same time, severely undercutting the power of these same citizens and the EPA to order polluters to appropriately clean up contamination. Ultimately, with the infusion of federal funds into state programs, and the inadequacies of various state programs noted above, Rep. Gillmor's draft bill could make communities across the nation almost powerless to protect themselves, or to seek protection from the EPA. Our organizations vehemently oppose these limitations, as they are an anathema to sound policies respecting protection of public health and environmental quality.

Eliminates Protections For Local Communities

Rep. Gillmor's draft legislation goes far beyond S.350 in a number of other ways that are also detrimental to protections for public health and environmental quality. For example, section 303 of Rep. Gillmor's draft legislation provides regulatory authority to amend all federal environmental laws to eliminate procedural permitting requirements. This could make it much easier to permit hazardous waste incinerators, permanent waste landfills, and discharges of toxic waste into water; create years of litigation; and ultimately, reverse decades of progress in ensuring public access to information and meaningful public participation in decisions affecting public health and environmental quality in neighborhoods across the nation.

Section 303 of Rep. Gillmor's draft legislation widely diverges from EPA's current policy for governor's concurrence on listing sites on Superfund's National Priority List (NPL). The veto authority it gives to a governor is far more absolute than EPA's current policy for governor's concurrence on listing sites under the NPL. It could cause unnecessary delays or blocks on EPA's authority to list highly contaminated sites, especially in instances where politically and economically powerful state interests may influence state decisions. It would also eliminate citizens' ability under section 105 of Superfund to petition EPA to list sites on the NPL. In addition, it also fails to provide local or county governments, who can be acutely affected by contaminated sites, with an avenue to get sites listed on the NPL.

Rep. Gillmor's draft legislation contains a host of other objectionable provisions. For example, section 128(e)(3) eliminates provisions that S.350's sponsors included to address environmental justice problems near toxic waste sites. Section 101 of Rep. Gillmor's bill would allow states to independently designate highly contaminated sites, including hazardous waste disposal sites and areas contaminated with polychlorinated biphenyls as "brownfields," while using federal taxpayer dollars to redevelop such site with little, if any, federal oversight.

Conclusion

Our organizations are united in our belief that state and federal government must ensure that contaminated sites are thoroughly and expeditiously cleaned. Cleaning up and then redeveloping sites with low levels of contamination provides a tremendous opportunity to revitalize urban areas throughout the nation and reduce sprawl. These considerations are critical for addressing threats to public health, problems in achieving environmental justice, and the need to preserve greenways. For these reasons, and many others, state voluntary clean up programs must satisfy minimum, common sense criteria that protect public health and involve the public in a meaningful way during the cleanup process. Further, any acceptable brownfields legislation must maintain a strong and effective federal safety net to protect families across the nation. The environmental and public health community wants a bill that meets these challenges head on, and ensures that the nation moves forward in rebuilding blighted communities and preserving precious open spaces. The Gillmor draft bill fails on all accounts and should be opposed.

If you have any questions, please do not hesitate to call Grant Cope (202/546-9707), Ed Hopkins (202/675-7908), or Faith Weiss (202/289-6868).

Sincerely,

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